AUG 5 1974

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In The

Supreme Court of the United States

October Term, 1974

No. 74-72

KEITH N. FLETCHER,

Petitioner,

v.

AMERICAN SECURITY & TRUST COMPANY,
TRUSTEE IN REORGANIZATION OF PARKWOOD, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BOLLING R. POWELL, JR.
POWELL, HORKAN & POWELL
815 Connecticut Avenue, N.W.
Washington, D. C. 20006
Counsel for Petitioner

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Keith N. Fletcher, by counsel prays that a writ of certiorari be issued to review the final judgment of the United States Court of Appeals for the the Fourth Circuit in the above styled case reversing the judgment of the United States District Court for the Eastern District of Virginia.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 490 F.2d 481. The opinion of the District Court is not reported. Both opinions are set forth in full in the Appendix hereto.

JURISDICTION

The three judge panel of the Court of Appeals entered its decision and opinion under date of January 21, 1974; its order denying a timely petition for rehearing was entered May 13, 1974. The jurisdiction of this Court is involved under 28 USCS 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether under the Bankruptcy Act the Respondent, as a District of Columbia private corporation appointed trustee in a Chapter X reorganization, has any authority pursuant to such appointment to engage in real estate transactions in Virginia as a foreign corporate trustee and to bring this action thereon as a foreign corporate trustee, not being qualified to do business in Virginia as a foreign corporation; when it is expressly prohibited from so qualifying by a Virginia Statute (Code § 6.1-5) providing that "no foreign corporation shall do a banking or trust business in the State"; and when it is expressly prohibited from bringing this action by a Virginia Statute (Code § 13.1-119).

2. Whether Respondent's action should have been dismissed under the applicable (Virginia or District of Columbia) statute of frauds on Petitioner's affirmative defense and timely motion, it being an action to charge Petitioner upon an alleged promise to answer for the debt, default or misdoings of one Bruce Noland and upon a contract for the sale of Virginia real estate between Noland and Respondent Trustee, when there is no evidence whatever of any written memorandum or note thereof signed by Petitioner.

3. Whether Respondent's action should have been dis-

missed on Petitioner's affirmative defense and timely motion, it being stipulated that at no time subsequent to Noland's default on his contract with Respondent and the resale of the property involved did the Respondent or Special Master or Bankruptcy Court ever state that the resale was for the account and risk of Fletcher, the Respondent, thus reserving to itself, as Trustee, the right to capture any increase in price over the Noland contract if it had been able to obtain an increased price on resale.

4. In view of the mandate in Rule 52(a) Federal Rules of Civil Procedure that the Court of Appeals shall not set aside findings of fact of the District Court "unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses," whether the three judge panel of the Court of Appeals erred in reviewing the evidence as an original fact finding tribunal and setting aside the District Court's basic dispositive finding of fact as to the agreement, purpose, intent and motive of Petitioner in giving Noland a copy of his financial statement in connection with the contract between Noland and Respondent, when the only evidence with respect to such agreement, purpose and motive was Petitioner's testimony before the District Court and that Court found his testimony credible.

5. Whether the Court of Appeals has correctly applied the proper local law of estoppel (Virginia or District of Columbia) or improperly devised its own law of estoppel, in reversing the District Court and holding Petitioner "became estopped to deny his status as a co-purchaser of the property" when:

a. Respondent admitted through the uncontradicted testimony of its Senior Vice President and Trust Officer before the District Court that Respondent as the

Trustee in Reorganization had never relied on Petitioner as being a co-purchaser but had looked only to Noland for performance of the Noland-Respondent contract; and

b. The evidence is without conflict that during the controlling period of time from April 12, 1967, when Petitioner gave Noland his financial statement, to June 28, 1967 when Respondent reported to the Bankruptcy Court Noland's default under the Noland-Respondent contract, neither the Respondent nor the Special Master (Referee in Bankruptcy) in any of their reports, applications, motions or other communications to the Bankruptcy Court represented to that Court that Pettitioner was a co-purchaser of the property or that there was any reliance on Respondent's being a co-purchaser; and when at no time during this controlling period of time did the Bankruptcy Court in any of its orders state that Petitioner was a co-purchaser of the property or was being relied upon as such; and

c. When in fact Petitioner was not even mentioned in any of such Bankruptcy Court orders, and no copies of such orders, or other notices or applications or motions were ever sent to Petitioner; and

d. When it is stipulated that at no time during this controlling period was there ever any communication whatever, either oral or written, between Respondent and Petitioner; and that it was not until after this controlling period of time that Respondent, for the first time, belatedly sought to hold Petitioner responsible as a co-purchaser.

STATUTES INVOLVED

The Federal statutes involved are Section 45 of the Bankruptcy Act (11 USC § 73); Section 156 of the Bankruptcy Act (11 USC § 556); and 28 USC § 959.

The State statutes involved are Code of Virginia (1950, as amended) §§ 6.1-5 and 13.1-119.

The pertinent statutory provisions are set forth in the Appendix hereto.

STATEMENT OF THE CASE

The Proceedings Below

The Complaint in this case was filed by the Respondent American Security & Trust Company, as Trustee in Reorganization of Parkwood, Inc., against the Petitioner Keith N. Fletcher, in the United States District Court for the Eastern District of Virginia (Alexandria Division). In the Complaint Respondent Trustee prayed a judgment in the amount of $246,354.54 plus interest and costs as actual damages alleged to have been suffered by it because of one Bruce Noland's breach of a contract to purchase from Respondent Trustee certain valuable Virginia real estate involved in the reorganization of Parkwood, Inc.

In its Complaint Respondent alleged several contradictory theories for its cause of action against Petitioner: (1) Noland and Petitioner were joint venturers and therefore Petitioner was liable for Noland's default; (2) Noland was Petitioner's agent and therefore Petitioner was liable as principal for Noland's default; (3) Petitioner was not a co-purchaser of the property with Noland but Petitioner should be estopped to deny that he was a co-purchaser; and (4) Petitioner had fraudulently deceived the Bankruptcy Court into believing he was financially backing Noland in

the purchase of the whole property and should be held liable to Respondent Trustee for its alleged damages.

The bases of jurisdiction of the District Court alleged in the Complaint were (a) The Bankruptcy Act (11 USC § 11) and (b) diversity of citizenship under 28 USC § 1332, Respondent being a District of Columbia corporation, the Petitioner being a citizen of Virginia and the amount in controversy exceeding $10,000.

The Petitioner Fletcher's Answer denied the Complaint allegations of a joint venture and of a principal and agent relationship between Petitioner and Noland for the purchase of these properties; denied there was any basis for estoppel; and denied the fraud allegations. Petitioner's Answer also interposed the affirmative defenses of Respondent's lack of authority to act as a corporate Trustee in Virginia and to bring this action in Virginia; the statute of frauds; and failure of the Respondent Trustee and the Bankruptcy Court court to resell the properties after Noland's default for the account and risk of Respondent Fletcher.

The District Court after an ore tenus hearing without a jury found that none of the theories of Respondent Trustee's action were sustained by the evidence, and ordered the dismissal of the suit against Petitioner with prejudice, ruling that Respondent Trustee must look to Noland alone for the collection of the judgment in the amount of $246,-354.54 previously awarded Respondent Trustee as damages for Noland's breach of the contract by the United States District Court for the District of Columbia sitting in bankruptcy. The Respondent Trustee has instituted judgment collection procedures in a Virginia court against substantial Virginia properties owned by Noland.

The three judge panel of the Court of Appeals rejected all of Respondent Trustee's theories of action against Petitioner except estoppel, on which theory it reversed the

District Court and held that on the basis of the evidence Respondent "became estopped to deny his status as a co-purchaser of the property."

Respondent Trustee's Status

American Security and Trust Company was appointed Trustee in Reorganization under Chapter X of the Federal Bankruptcy Act of Parkwood, Incorporated, by the United States District Court for the District of Columbia (hereafter the "Bankruptcy Court") on June 13, 1966. On July 8, 1966, it was appointed Trustee in Reorganization of corporations affiliated with Parkwood. On July 12, 1966, the Trustee's bond was approved by the Bankruptcy Court and the Court declared that under the terms of the orders of the Court appointing it, Respondent was duly qualified as Trustee in Reorganization of Parkwood and affiliated corporations. It has continued to act in that capacity. (¶ 1 Stipulation printed in Appendix.)

The Respondent Trustee is a District of Columbia corporation and is not now, nor has it ever been, qualified to do business in Virginia. (¶ 2 Stipulation printed in Appendix.)

Facts—Preliminary Period Before Respondent Fletcher Entered The Picture

Acting as Trustee the Respondent undertook to manage, operate and negotiate the sale of properties of Parkwood, Inc. located in three states and in the District of Columbia. Among these properties were the North Wales and Ullman tracts in Fauquier County, Virginia. North Wales consists of approximately 3,200 acres of woodland and pasture, a manor house and various outbuildings. The Ullman Farm, contiguous to North Wales, consists of approxi-

mately 504 acres of farmland, a house and assorted outbuildings. The total acreage of North Wales-Ullman, therefore, is approximately 3,700 acres. (¶¶ 2 and 4 Stipulation printed in Appendix hereto.)

Deciding that its continued operation of these Virginia properties was not feasible the Respondent Trustee undertook to advertise and negotiate for the sale of these Virginia properties. It entered into a contract of sale for $1,665,000, with a $5,000 deposit, dated February 15, 1967 with one Bruce Noland of Fauquier County, Virginia, a land developer and owner of properties of substantial value in the Warrenton, Virginia area. The contract was subject to the approval of the Bankruptcy Court. (¶¶ 4; 5; 6; 7; 8 of Stipulation printed in Appendix hereto and Pltf. Ex. 2 R. Ct. of App.)

On March 30, 1967 a hearing was held on the sale of the land under this contract before the Referee in Bankruptcy acting as Special Master. In the course of the hearing after higher bids were made with more substantial cash deposits by third parties, Noland increased his contract price to $1,900,000, and was the high bidder. At the suggestion of one of the other bidders the Special Master requested "financial statements on the principals who are going to be responsible for this." (¶¶ 11; 12; 13; 14; 15; 16 of Stipulation printed in Appendix hereto.)

Facts—Critical Formative Period Of Factual Evidence

Then comes the critical date of April 12, 1967. Prior to that date Fletcher had no connection or exposure in this matter other than he had read in the newspapers that Noland was purchasing the properties and he had noticed Noland's "For Sale" signs posted on the properties. He knew nothing of the March 30th hearing or of the Special Master's request for financial statements.

Petitioner, Fletcher, was a self made business man with a high school education. Starting out as a filling station operator in Warrenton, he had acquired several local businesses over the years and built rental properties, doing much of the physical construction labor himself. One of his businesses was a bowling alley in Warrenton. About 10:00 p.m. on the evening of April 12, 1967, Noland came to see Petitioner Fletcher in this bowling alley where Petitioner was working conducting its operation. This was the first time Noland and Fletcher ever discussed these properties and Noland's purchase of them. (¶ 17 Stipulation printed in Appendix hereto; Trans. of Trial pp. 80-85 Joint App. Ct. of App.)

The only evidence of what occurred at the critical April 12, 1967 meeting between Respondent Fletcher and Noland is the testimony of Fletcher before the District Court. The Respondent did not call Noland as a witness although he was available, and Respondent's failure to do so was noted by the District Court Judge, who stated it was the duty of Respondent Trustee to call him. (District Court's Opinion and Order Jt. App. Ct. of App. p. 11; Transcript of Trial, Jt. App. Ct. of App. p. 186.)

The District Court Judge believed Petitioner Fletcher's testimony, after personally cross-examining him on the witness stand, as to what transpired between Noland and Fletcher at the critical April 12, 1967 meeting and based his finding of fact on what happened at that meeting upon Fletcher's testimony, which reflected a simple straight forward business arrangement. The Court of Appeals rejected Fletcher's testimony as to the April 12, 1967 arrangement between Fletcher and Noland, characterizing it as being "at some variance" with the written memorandum of Noland set forth below, and as a "scheme" that "smacks of a rather apparent device to conceal from the bankruptcy

court the true facts surrounding the purchase of the property" (Ct. of App. Decision and Opinion on January 21, 1974 pp. 13; 14 printed in Appendix hereto.) Thus, the Court of Appeals set aside this critical finding of the District Court by finding Petitioner's testimony not credible and on the basis of inferences it drew that were contrary to the testimony of Fletcher the District Court had found credible. The Court of Appeals panel thus acted as an original fact finding tribunal.

The District Court's finding as to what happened at the April 12th meeting and the arrangement agreed to at that time between Fletcher and Noland, is as follows:

> "Fletcher knew nothing about Noland's negotiations with the Trustee or his representations to the Special Master in re Noland's purchase of the North Wales and Ullman tracts until late in the afternoon of April 12, 1967. (He had heard that Noland had purchased the property and had seen Noland's 'For Sale' sign on the property some time in early April.)
>
> "Noland told Fletcher on April 12th that he had resold the Ullman farm to a Van Roijen for $300,000.00 and that he had sold the North Wales mansion house and about three hundred acres to one Naylor for $1,300,000.00, and that he had about twenty-six hundred acres left to resell and that he needed $300,000.00 in addition to what Van Roijen and Naylor would pay him to meet the $1,900,000.00 purchase price he had agreed to pay the trustee.
>
> "Noland offered to resell the twenty-six hundred acres to Fletcher for $300,000.00 and agreed to divide the land into parcels and resell the property to others if Fletcher would agree to buy the land. He further agreed to guarantee Fletcher a $50,000.00 profit on the transaction.
>
> "Noland also told Fletcher that he could pay the $300,000.00 by assuming the $300,000.00 deed of trust

note held by the Metropolitan Life Insurance Company, one of the creditors in the bankruptcy proceeding, but that he would have to show Metropolitan that his net worth was sufficient to guarantee payment of the note.

"Fletcher agreed to Noland's propsal because he did not see how he could lose any money. He then gave Noland a signed copy of his financial statement for the purpose of satisfying the Bankruptcy Court and the Metropolitan Life Insurance Company of his financial ability to assume and service the $300,000.00 owed Metropolitan.

"Noland then wrote the following memorandum and gave it to Fletcher:

'April 12, 1967

'I, Bruce Noland, do hereby promise to pay Keith N. Fletcher $50,000.00 for the use of his financial statement in the purchase of the North Wales and Ullman properties located at Fauquier County, Virginia.

'This statement will be presented along with Robert Naylor's and my own statement to the Referee in Bankruptcy, John A. Bresnahan.

'My use of Keith N. Fletcher's financial statement is not intended to obligate Mr. Fletcher in anyway whatsoever regarding the purchase or resale of any of the above property.

'If for any reason the Court does not award the sale of the above property to me, then this agreement shall be null and void.

/a/ Bruce Noland'

"The record here made further discloses that Noland did attempt to sell Naylor the mansion house and some three hundred acres for around one million dollars and that he did attempt to get Naylor favorable financing for the purchase of the property—Noland got Naylor's financial statement for this purpose."

(District Court's Opinion and Order printed in Appendix hereto.)

By letter dated April 12, 1967, to the Special Master filed in the Bankruptcy Court on April 13, 1967, Noland submitted his own financial statement and those of Fletcher and Naylor as those of the "principal (sic) involved." Accompanying Noland's letter was a paper totaling the three financial statements to show a "total net worth" of $5,143,964 for Fletcher, Naylor and Noland. Also accompanying Noland's letter of April 12 were documents purporting to be copies of letters from Noland to Naylor and to Fletcher requesting them as "principals" to furnish their financial statements for forwarding to the Bankruptcy Court. (¶ 21 Stipulation printed in Appendix.)

Both Fletcher (in his District Court testimony) and Naylor (in a deposition) denied ever having received a copy of Noland's letter of April 12, 1967 to the Special Master and denied ever having received any letters from Noland, (purported copies of which were enclosed by Noland with his April 12, 1967 letter to the Special Master) calling on them to supply their financial statements as "principals." Again, Noland was not called by Respondent Trustee as a witness to testify about these purported letters. The District Court noted the "March 3, 1967" date on the purported Noland letter to Naylor was twenty-seven days prior to the March 30 hearing when the Special Master first requested financial statements of principals. In addition, the "April 4, 1967" date on the purported letter from Noland to Fletcher was eight days prior to April 12, 1967,

when it is stipulated Noland communicated with Fletcher about this matter for the very first time.[1]

On May 9, 1967, the Special Master rendered his Report to the Court on the Trustee's Application for authority to accept Noland's offer. The Special Master recommended that the "proposed sale to the high offerer, Mr. Bruce Noland, . . . be approved." He simply attached copies of all the financial statements he had received from bidders to the Report, and stated: "These statements are submitted with this Report without comment." The Special Master's Report contained no finding that Fletcher was in fact a principal; or that any reliance was placed by the Special Master upon Fletcher's being a principal or upon the financial statement that purported to be Fletcher's. The Special Master simply attached the financial statement to his report "without comment." The Special Master did not send a copy of his Report to Fletcher and made no inquiries of Fletcher as to his status. (¶ 26 Stipulation printed in Appendix hereto; Def.

[1] The purported April 4, 1967 letter read as follows:

"Bruce Noland Company
General Contractors
Warrenton, Virginia

Mr. Keith N. Fletcher
Warrenton, Virginia

April 4, 1967

Re: Parkwood, Inc.
North Wales and
Ullman Properties

Dear Mr. Fletcher:

I have been instructed by the Federal Court in Washington, D.C. to submit a financial statement of all principals involved in the purchase of the North Wales and Ullman Properties.

Since you are one of the principals I would like to have your statement at your earliest convenience.

Yours truly
Bruce Noland"

Ex 7 Ct. of App. Record). It was on the basis of the Special Master's Report of May 9, 1967, that the District Court below found:

> "We do not know whether the Special Master relied on Fletcher's financial statement in recommending that Noland's offer be approved. His reports are silent on the subject—and he was not called to testify." (Dist. Cts. Opinion and Order of December 15, 1972, p. 9, printed in full in Appendix hereto).

The Court of Appeals set aside this basic finding of the District Court.

On May 17, 1967 The Bankruptcy Court entered an Order directing the Trustee to send a Notice of the proposed Order authorizing the sale of North Wales and Ullman properties to Noland to all parties interested in the reorganization estate. This Order did not mention Naylor or Fletcher by name. Fletcher was not sent a copy of this Notice. On May 24, 1967 the Bankruptcy Court entered its Order authorizing the sale of North Wales and Ullman Farm to Noland. Neither Naylor nor Fletcher was mentioned by name in the Order nor was a copy sent to Fletcher or Naylor.

The Order recites in part:

> "... it appearing ... that copies of said Report (of the Special Master) have been served on all parties in interest, that notice has been given to all parties in interest of the Court's intention ... to enter this Order (of which copies have been furnished to all such parties) ..."

The Order contained no finding that Fletcher was in fact a principal; or that any reliance was placed by the Court upon Fletcher's being a principal or upon the financial

statement that purported to be Fletcher's. In fact, Fletcher was not even mentioned in the Court's Order. (No. 27; 28 Stipulation printed in full in Appendix; Def. Ex 9 (Order of *May 24, 1967 Ct.) of App. Record).*

It was on the basis of the Bankruptcy Court's own Orders of May 17 and 24, 1967 that the District Court below found:

> " On May 17, 1967 the Bankruptcy Court entered an order directing the Trustee to send notice of the proposed order authorizing the sale to Noland to all interested parties—This order did not mention Naylor or Fletcher—Neither was sent a copy of the notice."
>
> * * *
>
> "It is also significant to note that Fletcher's name is not mentioned anywhere in the order approving the sale to Noland or in the deed conveying the land to Noland."
>
> * * *
>
> "Further, there is nothing in this record indicating that the Bankruptcy Court relied on the financial statement of Fletcher in approving the Trustee's and the Master's recommendations that Noland's offer to purchase the property be approved." (District Court's Opinion and Order printed in Appendix hereto.)

The Court of Appeals panel set aside these basic findings of the District Court.

Between April 13, 1967 and May 24, 1967, neither the Trustee, the Special Master nor anyone else made an investigation to determine whether the financial statements of Naylor and Fletcher submitted by Noland to the Court were bona fide, whether the financial statements of Naylor and Fletcher accurately reflected their financial conditions, or whether Naylor or Fletcher had authorized Noland

to file their financial statements with the Special Master, and, if so, for what purpose. At no time between April 13, 1967 and May 24, 1967 did the Trustee or the Special Master make any inquiry, either orally or in writing, of Fletcher to determine what position, if any, he had in the purchase of these properties. (¶ 29 Stipulation printed in Appendix hereto).

Under the terms of the contract for the sale of the properties approved by the Court in its Order of May 24, 1967, the closing on the sale of the properties was to be held June 23, 1967. At no time prior to the closing, or thereafter, did Noland ask Fletcher to produce all or any part of the purchase price. (¶ 30 Stipulation printed in Appendix).

At some time prior to the scheduled June 23, 1967, closing the Trustee had come to suspect that Noland might encounter difficulties in obtaining sufficient money to close the sale. (¶ 31 Stipulation printed in Appendix).

At the settlement meeting held on the morning of June 23, 1967, between Noland and representatives of the Trustee, at its office in Washington, D. C., Noland failed to tender the purchase money and the contract was thereupon in default. (¶ 32 Stipulation printed in Appendix).

At no time prior to the closing or on the occasion of the closing did the Trustee either notify Fletcher of the closing, or forward to Fletcher a draft of the proposed deed, or ask Fletcher who should be named in the deed as grantees, or demand that Fletcher pay all or any part of the purchase price. By letter dated June 19, 1967, the Trustee wrote Noland notifying him of the time and place of the closing and the form of payment, and enclosed a draft of a special warranty deed transferring the properties to Noland only. (¶ 33 Stipulation printed in Appendix).

On June 28, 1967, the Report of Trustee on Default of

Purchase of North Wales and Ullman Farm was submitted to the Bankruptcy Court. This Report did not mention Fletcher or Naylor nor did it state anyone was in default except Noland. The Report did not state that Fletcher was in fact a principal or that the Trustee had relied upon his being a principal, or had relied upon his purported financial statement. At the time the Trustee filed this Report subsequent to Noland's default it had never communicated in any way with Fletcher nor had it made any demands on Fletcher as to the purchase of or payment for the properties. (¶ 27 Stipulation printed in Appendix; Def. Ex 13 Ct. of App. Record).

On June 30, 1967, the Trustee wrote identical letters to Fletcher and Naylor stating:

> "Because of your connection with the offer of Mr. Bruce Noland to purchase the properties of Parkwood, Incorporated, known as North Wales and Ullman Farm, we are enclosing a copy of the Report of the Trustee filed yesterday with the United States District Court for the District of Columbia, as well as a copy of a letter we have addressed today to Mr. Noland."

The Trustee's letter did not state Fletcher was in default in the matter or make any demands upon Fletcher as to the purchase or payment for the properties. (¶ 38 Stipulation printed in Appendix).

June 30, 1967 ended the critical formative period during which the evidence of greatest probative value developed and came into being, as set forth above. It was on the basis of the evidence that developed during this critical period that the District Court based its findings of fact that

1. Fletcher was not a principal in the purchase of the properties in question, and neither the Trustee, nor the Special Master nor the Bankruptcy Court re-

garded Fletcher as a principal in this purchase or relied upon his financial statement as establishing that he was a principal or that he was obligated to pay the $1,900,000 purchase price.

2. Proof that the Special Master got Fletcher's financial statement from Noland was not enough—there being no evidence that Noland had any authority to use Fletcher's name or credit in Noland's bid to purchase the property in question or that during this critical period any one thought that Fletcher had any interest therein.

3. The Senior Vice-President and Trust Officer of the Respondent Trustee, in testifying before this Court, was frank and honest—He unequivocally stated that all of his dealings in re the sale of Parkwood's properties were with Noland—He did not rely upon Fletcher's financial statement in recommending that Noland's bid be accepted—He thought he was selling the property to Noland and to no one else.

4. The Respondent Trustee can rise no higher than its own testimony. Its belated contention that Fletcher was an undisclosed principal and/or joint venturer with Noland in the purchase of the said property or that the Trustee and the Special Master and the Bankruptcy Court relied on Fletcher's being such was totally lacking in evidentiary support—The burden was upon the Respondent Trustee to so prove—This it has failed to do.

The Court of Appeals panel set aside these basic findings of the District Court.

Facts—The Post-Critical Period When Certain Self-Serving Hearsay Evidence Developed

Several months after Noland defaulted on his contract the Referee in Bankruptcy (who had acted as Special Master

in connection with the Noland contract procedures) while hearing a motion for production of documents in the bankruptcy reorganization is reported to have volunteered the following statement:

> "Since I was the one that made the recommendation that the sale be made to Mr. Noland and I had these documents (the financial statements and others) before me, I have to tell you at this time that it was on the strength of the financial statements of the three people that I made the recommendation."

Since this statement was reported in the transcript of that motion hearing, counsel for Fletcher in the District Court below stipulated that the Referee made the statement, but did not stipulate as to the truth of the statement. (¶ 53 Stipulation printed in Appendix).

The statement, of course, is hearsay. It is not testimony given by the Referee in the District Court under oath and subject to cross-examination. It is contradicted by the Referee's own Report of May 9, 1967, as shown above in this Petition. It is also self-serving as an attempt on the part of the Referee to justify his previous action and recommendation to the Bankruptcy Court, which had proved to be unwise because of Noland's default. Thus, it had little, if any, probative value, and this is how the District Court evaluated it when it found:

> "We do not know whether the Special Master relied on Fletcher's financial statement in recommending that Noland's offer be approved. His reports are silent on the subject—and he was not called to testify—We do know he never talked to Fletcher or sent him word that he would be held responsible for Noland's performance of the contract."

The three judge panel of the Court of Appeals set aside this finding of the District Court, and found the Special Master had relied on Fletcher's financial statement. The Court of Appeals action in this regard was based wholly on the above quoted belated statement of the Referee which suffered all the evidentiary infirmities of a self-serving contradictory hearsay statement volunteered by the declarant. Obviously the preponderence of probative evidence supports the basic and critical finding of the District Court. In any event it cannot be said the District Court was "clearly wrong."

Almost three years after Noland defaulted on his contract counsel for the Trustee drafted and presented to the Bankruptcy Court an ex parte Order authorizing the bringing of this action by the Trustee against Fletcher, buried in the preamble of which was the following statement: "... and it appearing ... that the Court relied on Keith N. Fletcher's signed financial statement in deciding to award the sale of North Wales and Ullman Farm to Bruce Noland ..."

Since this statement does appear in that ex parte Order, counsel for Respondent Fletcher stipulated in the District Court that the statement did appear in the Order, but did not stipulate that it was true. (¶ 57 Stipulation printed in Appendix).

The statement is not testimony or probative evidence of its truth in any sense. It is a self-serving statement incorporated by counsel for the Trustee in the ex parte Order in a boot-strap effort to prove his case. It is contradicted by the Bankruptcy Court's own orders and notices entered during the critical period in this matter, as shown above in this Petition. In none of the Bankruptcy Court's actions during the critical formative period in this matter did it make any findings with respect to the financial statements of Fletcher; it made no finding that Fletcher was a principal

or joint venturer or co-purchaser with Noland; it made no findings that Noland's contract should be approved because Fletcher's financial statement had been submitted by Noland; and it made no findings that the Court relied on Fletcher's financial statement in approving the Noland contract. In fact Fletcher's name was never mentioned by the Bankruptcy Court. It was on the basis of this evidence of highest probative value that the District Court found:

> "Further, there is nothing in this record indicating that the Bankruptcy Court relied on the financial statement of Fletcher in approving the Trustee's and the Master's recommendations that Noland's offer to purchase the property be approved." (Dist. Cts. Opinion printed in Appendix).

The District expressly rejected from the bench, during arguments on preliminary matters in this proceeding, the belated self-serving statement in the ex parte Order drafted by counsel for Trustee as being evidence of any probative value that the Bankruptcy Court in fact relied upon Fletcher's financial statement in awarding the contract to Noland. But it was upon this ex parte Order statement alone that the Court of Appeals panel set aside this basic finding of the District Court as being "clearly erroneous," thereby permitting counsel for the Respondent Trustee to create his "evidence" simply by drafting an ex parte Order

Facts—Postlude Period; The Resale And Subsequent Bankruptcy Proceedings

Subsequent to Noland's default the Trustee proceeded to resell the property. On October 27, 1967 the Bankruptcy Court entered its Order approving the resale to National Land Company for $1,700,000. It is stipulated that at no time during the resale proceedings did either the Trustee or

the Special Master or the Bankruptcy Court in any of their actions state that the resale was for the account and risk of Fletcher. (¶ 47 Stipulation printed in Appendix).

Without first making any demands on Fletcher with respect to Noland's default, the Trustee joined Fletcher in a summary bankruptcy proceeding before the Bankruptcy Court in the Trustee's Application filed July 11, 1967 for specific performance and damages. Counsel for Fletcher moved to quash the service of the Application by mail on Fletcher in Virginia on the ground that Fletcher had never submitted himself to the summary jurisdiction of the Bankruptcy Court since he was not a co-purchaser of the properties. The Bankruptcy Court sustained Fletcher's motion, stating:

> "Finally, all parties agree that the ultimate issue presented is whether, in the circumstances of this case, service of process is necessary, that is, whether Naylor and Fletcher can be classified as "purchasers" at a bankruptcy sale.
>
> * * *
>
> "The alleged status of Fletcher and Naylor as 'purchasers' of these properties is founded primarily in the use of their financial statements in connection with the contract of sale ultimately approved by the Court.
>
> * * *
>
> "What is apparent is that in spite of the presentation of the financial statements of Fletcher and Naylor by Noland in support of his offer to purchase North Wales and Ullman Farm, the status of these two individuals as 'purchasers' at a bankruptcy sale is open to serious question.
>
> * * *

"... the court has reservations over the propriety of such a procedure (summary jurisdiction) in a case where the alleged status of individuals as purchasers involved close complex issues and is based to such a great extent on tenuous concepts of apparent authority.

* * *

"In these circumstances, the Court is of the opinion that Fletcher and Naylor have not been shown to be 'purchasers' of North Wales and Ullman properties to the extent that the exercise of summary jurisdiction over them in this matter would be permissible (or) proper.

* * *

"The Court's opinion is limited to the precise issue of whether Fletcher and Naylor have been shown to have voluntarily consented to the summary jurisdiction of the Bankruptcy Court by clearly becoming purchasers at a bankruptcy sale. Such a showing has not been made."

* * *

At no point in this Order and lengthy opinion did the Bankruptcy Court state or indicate that it had relied on the Fletcher financial statement or on Fletcher's being a co-purchaser, in approving the sale to Noland.

The District Court below in its opinion of December 15, 1972, took special note of these findings by the Bankruptcy Court, recognizing, of course, that the Bankruptcy Court "made it clear, however, that its opinion in dismissing the application was not an adjudication of the merits of the Trustee's claim against Fletcher and Naylor." (District Court's Opinion and Order printed in Appendix hereto).

On February 12, 1971 the Bankruptcy Court entered a a summary judgment against Noland on Trustee's Applica-

tion for $246,354.54. The Trustee has effected the recording of this judgment in the Office of the Clerk of the Circuit Court of Fauquier County, Virginia. The Trustee is now pursuing the necessary proceedings in the Virginia Court to make its judgment good against Noland's substantial land holdings in Virginia.

REASONS FOR GRANTING THE WRIT

1. Under The Trustee Qualifications Prescribed In The Bankruptcy Act Respondent Had No Authority To Act As Trustee In Reorganization In Virginia Or To Institute This Suit.

This presents an important question of Federal law which has not been, but should be, settled by this Court.

Sections 156 and 45 of the Bankruptcy Act (11 USC §§ 73 and 556, see Appendix) expressly base the qualifications of a Bankruptcy Act corporate Trustee to act as such on the State or local law of incorporation. 11 USC § 73 reads: "Receivers and Trustees shall be (1) individuals . . . or (2) Corporations authorized by their charters or by laws to act in such capacity . . ." The authorities conclude that the legislative history of this section establishes these qualifications are "clearly mandatory." 2 Collier, Bankruptcy Section 45, p. 1702; 11 Remington, Bankruptcy, Sec. 4485, p 179.

Under its charter and the laws of the District of Columbia, where it was incorporated, the Respondent Trustee is only authorized to act as a corporate Trustee within the District of Columbia. Neither its charter nor the laws of the District of Columbia authorize it to act as a corporate Trustee in Virginia.

The public policy of Virginia as reflected in its statute (Code of Virginia (1950 as amended) § 6.1-5) expressly prohibits Respondent from doing a corporate trust business

in Virginia. This statute reads ". . . . no foreign corporation shall do a banking or trust business in this State, . . ." The Supreme Court of Virginia confirmed this conclusion in *National Savings and Trust Company* v. *Buchanan,* 183 Va. 290, 32 SE 2d 81 (1944) when it held that a District of Columbia corporate trustee was not authorized to execute a trust in Virginia.

It should also be noted that under 28 USC § 959 all Trustees appointed by Federal Courts are expressly required to execute their trusts "according to the requirements of the valid laws of the State in which such property is situated . . . ." The Virginia law prohibits the Respondent Trustee from executing its trust in Virginia because it is a foreign corporate trustee. This Federal statute is applicable to Trustees in bankruptcy and reorganizaton. Re *Wil-low* Cafeterias, 35 Fed. Sup. 968 (DCNY 1940) *Re Preble* Corp. 15 Fed. Sup. 776; 11 Remington Bankruptcy Sec. 4501 p. 211. Can it be contended that the Virginia statute is not valid?

The sanction provided by the Virginia statute (Code of Virginia (1950) as amended) § 13.1-119) against the Respondent Trustee for undertaking to execute a trust in Virginia as an unqualified foreign corporate Trustee is that it shall not "be permitted to maintain any action, suit or proceeding in any Court of this State, . . ." Thus, Respondent Trustee cannot bring this action in the Federal Courts in Virginia because under Rule 17(B) FRCP its capacity to sue as a foreign corporate Trustee "shall be determined by the law of the State in which the District Court is held."

It cannot be said the Virginia statute prohibiting Respondent from executing its trust in that State in anyway hinders the operation of the Bankruptcy Act and, therefore, is superseded by the Bankruptcy Act under such decisions as *International Shoe Co.* v. *Pinkus,* 278 U.S. 261, 49 S. Ct.

108, 73 L Ed 318 (1929); *Elliott* v. *Bumb*, 356 F 2d 749, 755 (CA9, 1966, cert den 385 US 829). The Bankruptcy Court in the District of Columbia could just as easily have appointed a Virginia corporate Trustee to execute the trust in Virginia. The Virginia corporate Trustee could submit itself to that Bankruptcy Court's jurisdiction upon accepting the appointment. Under 11 USC § 511 the Bankruptcy Court in a reorganization has exclusive jurisdiction of the debtor's property wherever located, and under 11 USC § 556 the appointed corporate Trustee in reorganization need not have an office in the district in which the appointing Bankruptcy Court sits.

It is submitted that this affirmative defense of the Petitioner should have been sustained below.

2. Respondent's Action Against Petitioner Is Barred By The Statute Of Frauds.

In failing to apply the applicable statute of frauds (Code of Virginia (1950 as amended) § 11-2, or District of Columbia Code (1973) § 28-3502) so as to bar Respondent Trustee's action against Petitioner the panel of the Court of Appeals so far departed from accepted and usual course of federal judicial proceedings as to call for an exercise of this Court's supervision.

This plenary action having been brought in a Federal Court in Virginia to hold Respondent Fletcher responsible for the debt and default of Noland on the contract between Noland and the Respondent Trustee, the Virginia statute of frauds, being worded procedurally i.e. "No action shall be brought," would appear to apply. It is recognized there is a conflict of authority as to whether a statute of frauds is procedural or substantive as to choice of law. In this case, however, the question is academic since the applicable por-

tion of both the Virginia and the District of Columbia statutes of frauds are substantially identical. Both statutes provide that "No action shall (D.C. 'may') be brought" ... "to charge any person upon a promise to answer for the debt, default or misdoings (D.C.—'miscarriage') of another; or, upon any contract for the sale of real estate ... unless the promise, contract, agreement ... or some memorandum or note thereof is in writing and signed by the party to be charged thereby, or his agent (D.C. 'or a person authorized by him')."

There is no evidence of any memorandum or note in writing signed by Petitioner Fletcher agreeing to be a copurchaser, or to finance Noland's purchase of these properties. The only written statement signed by Petitioner Fletcher was his financial statement, which he had signed only for the purpose of certifying it was correct before Noland even talked to him about those properties on April 12, 1967. Nothing Noland signed would take the matter out of the statute of frauds because it has now been adjudicated below that Noland was not Fletcher's agent.

Acting under the mandate in *Erie Railroad Company* v. *Tompkins,* 304 US 64, 58 S. Ct. 817, 82 Ed. 1188 (1938) and *Klaxon Company* v. *Sentor Electric Manufacturing Company,* 313 US 487, 61 S. Ct. 1020, 85 Ed. 1477 (1941) the United States District Court for the Western District of Virginia has construed the Virginia Statute of Frauds as procedural and, where applicable, as barring an action brought in the Federal Courts in Virginia. *Stein* v. *Pulaski Furniture Corporation,* 217 F. Supp. 587 (1963 DCWDVA): *Brown* v. *Valentine,* 240 F. Supp. 539 (1965 DCWDVA). In *Stein* the Court held "... It is the decision of this Court that Section 11-2 of the Code of Virginia is procedural, or remedial, in nature and accordingly no action

may be brought in this State on an oral contract falling within the bar of Virginia Statute of Frauds." Accordingly, the Federal Court dismissed the action on this ground.

For the same reason Petitioner Fletcher's affirmative defense of the statute of frauds should have been sustained below and Respondent's action dismissed. In failing to do so the panel of the Court of Appeals so far departed from accepted and usual judicial procedure that it should be corrected by this Court in the exercise of its power of supervision.

3. The Bankruptcy Court Resale Of The Properties Not Having Been Effected For The Account And Risk Of Petitioner He Cannot Be Held Liable For Any Deficiency In Resale Price Or Damages.

This also presents an important question of Federal bankruptcy law which has not been, but should be, settled by this Court.

It is stipulated that at no time prior to the resale of the properties was it ever stated orally or in writing, by the Trustee or any of its representatives or attorneys, or by the Special Master, or by the Bankruptcy Court, that the sale of the North Wales and Ullman properties to National was for the account and risk of Fletcher. (¶ 47 Stipulation printed in Appendix).

The lower Federal Courts in other cases have held that where a trustee in bankruptcy resells property after the purchaser at the first sale defaults in completing the purchase, the trustee is put to the election of either reselling for his own account as trustee or reselling for the account and risk of the defaulting purchaser. If the trustee elects to resell the property for his own account and risk as trustee, then the trustee will be entitled to any increase in the price obtained for the property at the second sale and, on the other

hand, the trustee cannot hold the defaulting purchaser at the first sale responsible for any loss due to receipt of a lower price on the second sale or additional costs sustained.

If, on the other hand, the trustee elects to hold the second sale for the account and risk of the defaulting purchaser and this election is timely and effectively reflected before the resale either in the order of resale, the notice of resale or announcement at the resale, these Federal cases hold that then, and only then, may the trustee hold the defaulting purchaser at the first sale liable for any loss sustained due to receipt of a lower price for the property on the second sale or due to costs sustained by virtue of having to hold the second sale. *Gordon* v. *Woods* 189 Fed. 2nd 76 (1951 CA 1st); Re: *Huguenot Publishing Company, Inc.*, v. *Folsom*, 83 Fed. 2nd 258 (1936, CA 2nd): In Re: *Dallek Brothers, Inc.*, 8 Fed. Sup. 610 (DCSDNY 1934); In Re: *Atlas Cabinet Works, Inc.*, 8 Fed. Sup. 609 (DCSDNY 1931); in Re: *Rival Knitting Company*, 289 Fed. 960 (1923 CA 2nd)

The reasonableness of this rule is explained in the opinion of the District Court for the Southern District of New York in *Atlas Cabinet Works, Inc., supra.* There the Court dismissed a proceeding by the Trustee in Bankruptcy to compel the defaulting purchaser of property at the first sale to pay over to the trustee the deficiency in the purchase price where the property was sold for less at the second sale. The Court based its ruling on the fact that the trustee had not obtained an order directing the resale for the defaulting purchaser's account and risk had not given any notice either in the advertisement of the resale or in the announcement made at the resale, that it was for the account and risk of the defaulting purchaser. The Court pointed out that before liability for a deficiency upon resale may be fastened

upon a defaulting purchaser at a judicial sale, certain preliminary steps must be taken, stating:

> "This may appear technical, but yet it seems to me orderly procedure and the rights of the defaulting purchaser require that in some fashion, by either an order, a notice or an announcement, the receiver put itself on record at sometime prior to the resale is on the purchaser's account . . . Suppose the unlikely had happened and on the second sale the property brought more than the $1,819.23 the defaulting purchaser had agreed to pay at the first sale. The receiver would doubtless have rejected the original purchaser's demand for the excess, with the explanation that it had waived the first sale and that the resale was on it own account."
>
> "I think, therefore, that the Referee's order dismissing the proceeding was right." (Page 610)

The fact that the Trustee instituted a summary bankruptcy proceeding against Noland, Naylor and Fletcher seeking recovery of damages is not sufficient for this purpose. In *Huguenot Publishing Company, supra,* Judge August Hand held that a Trustee in Bankruptcy must "obtain an order directing a resale at the purchaser's risk and requiring the purchaser to make good any loss due to receipt of a lower price on the second sale," in order that the Trustee in Bankruptcy be able to hold the defaulting purchaser at the first sale liable for any such loss. In that case the Court of Appeals (which consisted of three distinguished Judges, Learned Hand, Augustus Hand and Swan) reversed an order of the District Court directing that a defaulting purchaser pay the amount of the second sale deficiency, because the Trustee had not obtained an order in advance of the second sale directing that the resale would be for the defaulting purchaser's account and that he would be held liable for the balance. In its opinion, the Court stated the proper practice is indicated in *Camden* v. *Mayhew,* 129

US73, 9 S. Ct. 246, 32 L. Ed. 608 (1889) in which the Supreme Court ruled that in an equity receivership, it was necessary for the receiver to obtain an order from the Court directing "a resale . . . in the meantime at his risk, both in respect to the expenses of the resale and any deficiency in purchase price resulting therefrom." This procedure prescribed in *Camden* was reaffirmed and followed in *First National Bank of Washington* v. *Breezy Point Camp, Inc.*, 249 Fed. Sup. 359 (1966 DCSDNY); in *Freehill* v. *Greenfeld*, 204 Fed. 2nd 907 (1953, CA 2nd) and in *Gordon* v. *Woods, supra.* In *Gordon* the Court of Appeals for the First Circuit also reaffirmed *Huguenot Publishing Company, Inc., supra,* and *Rival Knitting Company, supra.*

It is submitted that Petitioner's affirmative defense of the failure of Trustee, or of the Special Master or of the Bankruptcy Court to put itself on record in a timely manner before the resale of the properties by a statement that the resale was for the account and risk of Petitioner Fletcher, should have been sustained and this action dismissed on that ground.

4. In Setting Aside The District Court's Basic Findings Of Fact The Court Of Appeals Panel Has Failed To Comply With The Mandate Of Rule 52(a) FRCP Prohibiting Such Action Unless The District Court's Findings Are "Clearly Erroneous," Due Regard Being Given To District Court's Opportunity To Judge Credibility Of The Petitioner Fletcher, And Has Erroneously Acted As An Original Fact Finding Tribunal Passing On Conflicts In Evidence And Questions Of Credibility.

The Court of Appeals panel set aside the District Court's findings on the following dispositive facts:

1. The agreement, purpose, intent and motive of Petitioner Fletcher in giving Noland a copy of his financial statement on April 12, 1967 in connection

with the contract between Noland and Respondent Trustee.

2. The failure of the Respondent Trustee to prove by a preponderance of the evidence that either the Special Master or the Bankruptcy Court relied upon Petitioner Fletcher's financial statement as establishing that he was a co-purchaser of the properties with Noland.

The evidence on these findings has been set forth and analyzed at length in this Petition under those portions of "Statement Of The Case" entitled "Facts—Critical Formative Period Of Factual Evidence" and "Facts—The Post Critical Period When Certain Self-Serving Hearsay Evidence Developed." This analysis will not be repeated here.

Suffice it to say that on "1"—Fletcher's agreement, purpose, intent and motive in giving Noland a copy of his financial statement, the only testimony was that of Fletcher (the Trustee did not call Noland to the stand). The District Court had the opporunity of hearing Fletcher testify, of questioning him directly and evaluating his credibility. The panel of the Court of Appeals did not have this opportunity of evaluating Fletcher's credibility. Yet the District Court believed Fletcher and based this finding on his uncontradicted testimony, but the Court of Appeals panel did not believe Fletcher and set aside the District Court's finding based thereon. The Court of Appeals panel undertook to draw certain inferences prejudicial to Fletcher's agreement, purpose, intent and motive from the April 12, 1967 memorandum (which according to the Court of Appeals panel conflicted with his testimony) written and signed by Noland, notwithstanding that memorandum Noland expressly stated:

> "My use of Keith N. Fletcher's financial statement is not intended to obligate Mr. Fletcher in anyway whatsoever regarding the purchase or resale of any of the above property." (Set forth in full in District Court's Opinion printed in Appendix p. 16).

Suffice it to say that on "2"—failure of Trustee to prove reliance by Special Master or Bankruptcy Court on Fletcher's statement by a preponderance of the evidence, the Court of Appeals panel based its action in setting aside the District Court's basic finding of no such reliance upon the self-serving hearsay statements (discussed above) that were belatedly made long after Noland's default on his contract and which have little or no probative value, as the District Court recognized.

The Court of Appeals panel has failed to accord the District Court's basic findings of fact the "great weight" to which they are entitled under Rule 52 (a) FRCP as construed by this Court. *United States* v. *U.S. Gypsum Co.*, 333 US 364, 68 SCt. 525 (1948).

Contrary to the mandate of Rule 52(a) the Court of Appeals panel has undertaken to review the evidence as an original fact finding tribunal, to settle what it regarded as conflicts in evidence and to determine questions of credibility. This is contrary to the purpose of Rule 52(a) as was held in *Campana Corp.* v. *Harrison*, 114 F 2d 400 (CA 7th 1940) where that Court of Appeals held:

> "In the application of Federal Rule 52 it is the following principle that guides this Court; the reviewing Court does not review the evidence as an original fact finding tribunal; it does not attempt to settle conflicts in evidence or to determine questions of credibility. In re Duvall, 7 Cir., 103 F. 2d 653, 655; Guilford Const. Co. v. Biggs, 4 Cir., 102 F.2d 46, 47. Of course Federal

Rule 52 does not require us to accept fact findings unsupported by the evidence."

The Court of Appeals panel below has so far departed from the accepted and usual course of judicial proceedings under Rule 52(a) as to call for the exercise of this Court's power of supervision to correct it. This is an important question of Federal procedure in the application of which there now exists a conflict between the Courts of Appeal of the 7th and 4th Circuits and should be settled by this Court.

5. The Court Of Appeals Panel Has Failed To Apply The Applicable Law Of Estoppel (Virginia Or District Of Columbia) And Contrary to Erie v. Tompkins Has Erroneously Devised Its Own Law Of Estoppel In Holding Petitioner Became Estopped To Deny His Status As A Co-Purchaser Of The Property.

The law of estoppel of the District of Columbia as reflected in *Parker* v. *Sager,* 85 U.S. App. D.C. 4, 174 F2d 657 (1949); and *McNamara* v. *Miller,* 106 U.S. App. D.C. 64, 269 F 2d 511 (1959) appears to be essentially the same as the Virginia law of estoppel. Thus, any question of proper choice of law would be academic.

The Court of Appeals panel professed to apply the Virginia law of estoppel, but overlooked such basic and indispensable elements thereof, which prevent the application of the Virginia law of estoppel in this case, that a federal law of estoppel was devised and applied by the panel contrary to the doctrine of *Erie* v. *Tompkins, supra.*

In the first place, under the law of Virginia a factual basis for estoppel cannot be proved by inferences from evidence, but each of the necessary elements of estoppel must be proved by direct, unequivocal and precise testimony or other evidence of unequivocal probative value. Furthermore, this

strict burden of proof rests upon the party relying on the doctrine of estoppel.

In the recent Virginia case of *John Hancock Mutual* v. *Virginia National Bank,* 212 Va. 31, 33, 181 SE 2d 610 (1971) the Supreme Court of Virginia held:

> "The burden of proof rests upon the party relying on the doctrine of estoppel to prove *each element by clear, precise and unequivocal evidence.*" (p. 33, emphasis supplied)

In *John Hancock,* the Court cited with approval *Utica Mutual* v. *National Indemnity,* 210 Va. 769, 773, 173 SE 2d 855, 858 (1970) in which the Supreme Court of Virginia ruled the appellant therein failed to carry the burden of proof necessary to establish an estoppel, the Court stated:

> "It is elementary that the burden rests on the party relying on a waiver or estoppel to prove the essentials of such waiver or estoppel by clear, precise and unequivocal evidence. *The evidence must not leave the matter to mere inference* or conjecture but must be certain in every particular. Trayer v. Bristol Parking, Inc., 198 Va. 595, 606, 95 SE 2d 224 (1956). See also 7 Michie Jur., Estoppel § 39, p. 307 and 19 Michie Jur., Waiver § 5, p. 537." (p. 773) (emphasis supplied).

Notwithstanding this very clear and precise requirement of the Virginia law of estoppel that the elements of estoppel cannot be based upon inference or conjecture, the panel of the Court of Appeals erroneously based its ruling that Fletcher is estopped to deny he is a principal wholly upon inferences and conjecture indulged in by the panel in the following respects:

1. Inferences and conjecture with respect to statements and absence of caveats and statements in

the April 12, 1967 memorandum of Bruce Noland (which does not state Fletcher is a principal; nor that Fletcher's financial statement will be presented to the Referee in Bankruptcy as that of a principal; and does expressly state (¶ 3) that by giving Noland his financial statement he did not assume any obligations of a purchaser of the properties);

2. Inferences and conjecture with respect to Fletcher's act of giving Noland a signed copy of his financial statement he had previously prepared for other purposes and notwithstanding Fletcher's testimony that he did not give the statement to Noland to become a principal is uncontradicted;

3. Inferences and conjecture with respect to the absence of any caveat having been written by Fletcher on his financial statement to the effect that he was not a principal;

4. Inferences and conjecture with respect to the fact Noland was to pay Fletcher $50,000, notwithstanding Fletcher's testimony that he did not give Noland his financial statement to feign becoming a principal is uncontradicted;

5. Inferences and conjecture with respect to Fletcher's subjective intentions as to what effect his financial statement was to have on the Referee in Bankruptcy Court, notwithstanding Fletcher's uncontradicted testimony that he only intended that his financial statement satisfy the Metropolitan Life Insurance Company and the Referee in Bankruptcy that he was financially able to assume a $300,000 deed of trust note in purchasing a part of the properties from Noland (not from the Trustee);

6. Inferences and conjecture that Noland was Fletcher's agent when there is no evidence that Noland had ever been previously associated with Fletcher

in business matters as his agent or in any other capacity and notwithstanding Fletcher's uncontradicted testimony that he had not authorized Noland to act for him as an agent or joint venturer in connection with Noland's contract with the Trustee;

7. Some of the inferences and conjecture indulged in by the Panel are couched in such language as "it is only logical to assume" (p.17); "This whole scheme smacks of a rather apparent device to conceal..." (p.14); "It is apparent from the agreement itself that it was intended" (p. 13).

In the second place the Panel overlooked completely another indispensable and dispositive element of the Virginia law of estoppel, i.e., equitable estoppel will never be applied at the instance of a party claiming to have been misled to his injury by misrepresentations of another when the party asserting estoppel had available means of acquiring knowledge of the true state of facts but failed to do so.

The Supreme Court of Virginia in refusing to apply the doctrine of estoppel on this ground in *Benoit* v. *Baxter,* 196 Va. 360, 83 SE 2d 442 (1954) cited and quoted with approval from the earlier Virginia case of *McMurray* v. *Dixon,* 105 Va. 605, 611, 54 SE 481 (1906) as follows:

> "It is essential to the application of the principles of equitable stoppel, or estoppel in pais, that the party claiming to have been influenced by the conduct or declarations of another to his injury, was not only ignorant of the true state of facts, *but had no convenient and available means of acquiring such information, and where* the facts are known to both parties, and *both had the same means of ascertaining the truth, there can be no estoppel."* Lindsay v. James, 188 Va. 646, 659, 51 S.E. (2d) 326; Lindsey v. Clark, 193 Va. 522, 526, 69 S.E. (2d) 342. (emphasis supplied).

In *John Hancock Mutual, supra,* the Supreme Court of Virginia rejected Virginia National Bank's contention that the insurance Company should be estopped to claim a set off of any loans it made pursuant to the "automatic premium loan provision" of a policy the Bank had taken as collateral on this ground, stating:

> "Yet, when the bank had Swersky assign the policy to it, *it did not inquire of him* whether he had elected to have the 'automatic premium loan provision' put into operation. *Nor did the bank inquire of the company* whether this provision was in effect. A witness for the bank testified that he *'(n)ever sought' that information."* (p.34). (emphasis added).

The Virginia law that the party asserting estoppel must be without available means of acquiring knowledge of the true facts is stated in *7 Michie, Jurisprudence, Estoppel* § 28 p. 287 with numerous supporting Virginia decisions as follows:

> "It may be stated, as a general rule, that it is essential to the application of the principle of equitable estoppel that *the party claiming to have been influenced by the conduct or declarations of another to his injury, was himself not only destitute of knowledge of the state of facts, but was also destitute of any convenient and available means of acquiring such knowledge; and that, where* the facts are known to both parties, or *both have the same means of ascertaining the truth, there can be no estoppel.*
>
> It is not necessary to prove that one claiming estoppel had actual knowledge of the truth in order to defeat him; *it is enough if* he were found to know the facts, or *his means of knowledge were equal to those of the other party, for a failure to protect himself by using means of knowledge was negligence and disentitles him to equitable relief"* (emphasis supplied).

The Respondent Trustee, the Referee in Bankruptcy acting as Special Master and the Bankruptcy Court all had convenient and available means to obtain knowledge of the true status, if any, of Petitioner Fletcher in this matter, but the record shows without contradiction that none of them made any inquiries of, or sought any information from, Fletcher either as to his status, if any, or as the bona fides of the financial statement of Fletcher proffered by Noland. Fletcher was not in hiding. He was at all times available for this inquiry. A simple letter or telephone call to him from either the Trustee or the Special Master or the Bankruptcy Court would have revealed the information that Fletcher was not a principal of Noland in the transaction between Noland and the Trustee. In addition, the discovery process of the Court was available for this purpose, but not used.

Understandably the Bankruptcy Court was relying upon the Trustee and the Special Master to make the necessary inquiries and develop the pertinent facts. Their failure to do so when the means were readily available was negligence on their part and disentitles all of them, including the Bankruptcy Court, to the equitable relief of estoppel under the law of Virginia in this case.

If the creditors of the bankrupt estate have been "milched" (as termed by the Court of Appeals panel p.14) out of their rights in this matter, it is not because of any misrepresentations on the part of Fletcher, but because of this negligence of the Respondent Trustee and of the Special Master, which was incorporated into the action of the Bankruptcy Court. As to the Trustee, at least, these creditors have relief available to them in the form of surcharge suit for this negligence.

In the third place the Panel has overlooked completely

still another indispensable and dispositive element of the Virginia law of estoppel, i.e. silence in order to work an estoppel must amount to bad faith. *7 Michie's Jurisprudence, Estoppel* § 20 p. 275 and cases cited.

The Supreme Court of Virginia in the recent case of *Garrett* v. *Ancarrow Marine, Inc.*, 211 Va. 755, 180 SE 2d 668 (1971) based its refusal to apply estoppel on this ground, stating:

> "The contract was in fact between Garrett and Ancarrow Marine. To support estoppel, Garrett relies upon Mr. and Mrs. Ancarrow's silence about the *financial* condition of Ancarrow Marine. But as pointed out by the commissioner, '(t)here is *no evidence whatever to show that either of the Ancarrows were motivated by bad faith or intended to mislead the plaintiff.*' So estoppel cannot be properly invoked. Cantrell v. Booher, 201 Va. 649, 654-55, 112 S.E. 883, 886-87 (1960). (emphasis supplied).

There being no communication whatever between Petitioner Fletcher and the Trustee or the Special Master of the Bankruptcy Court, there is no evidence of any affirmative statements, oral or written, by Fletcher representing himself to be a principal. So the Court of Appeals panel invokes Fletcher's silence in not affirmatively notifying the Trustee or Special Master or Bankruptcy Court that he was not a principal. But there is no evidence, and the panel does not find, that in not undertaking affirmatively to communicate to the Trustee or Special Master or Bankruptcy Court that he was not a principal, Fletcher was motivated by bad faith or intended to mislead the Trustee or Special Master of Bankruptcy Court.

The evidence is uncontradicted that Fletcher never knew the Special Master had requested financial statements of

principals; or that Noland proposed to, and did present Fletcher's financial statement to the Special Master as that of a principal. The evidence is uncontradicted that Fletcher in good faith understood he had a straightforward deal with Noland to buy from Noland (not the Trustee) only a part of the property by assuming a $300,000 deed of trust held by Metropolitan Life thereon, his financial statement to be used only for the purpose of satisfying Metropolitan and the Referee that he was financially able to assume and service this note, and that he was not to be obligated as a principal in any way in Noland's transaction with the Trustee.

Again, the District Judge below who observed Fletcher testify and who personally cross-examined him believed he was telling the truth and found this to be in fact the business deal between Fletcher and Noland, and that this was in fact the only purpose and motive of Fletcher giving Noland his financial statement on April 12, 1967. There was no testimony or evidence to the contrary.

The only person who might conceivably have undertaken to contradict Fletcher's testimony was Noland. The District Court noted that Noland was available to the Trustee as a witness but had not been called by the Trustee to testify. It is the well settled law of Virginia that the unexplained failure of a party to call an available material witness raises the presumption that the testimony of such witness would have been adverse to the party thus failing to call him. *Robins* v. *Old Dominion Power Company, Inc.*, 204 Va. 390, 394, 131 S.E. 2d 274, 277 (1963); *McGehee* v. *Perkins*, 188 Va. 116, 126, 49 S.E. 2d 304, 309 (1948).

In thus failing properly to apply the applicable law of estoppel the Court of Appeals Panel has so far departed

from accepted Federal judicial procedure as required by *Erie Railroad Company* v. *Tompkins, supra,* as to call for correction by this Court.

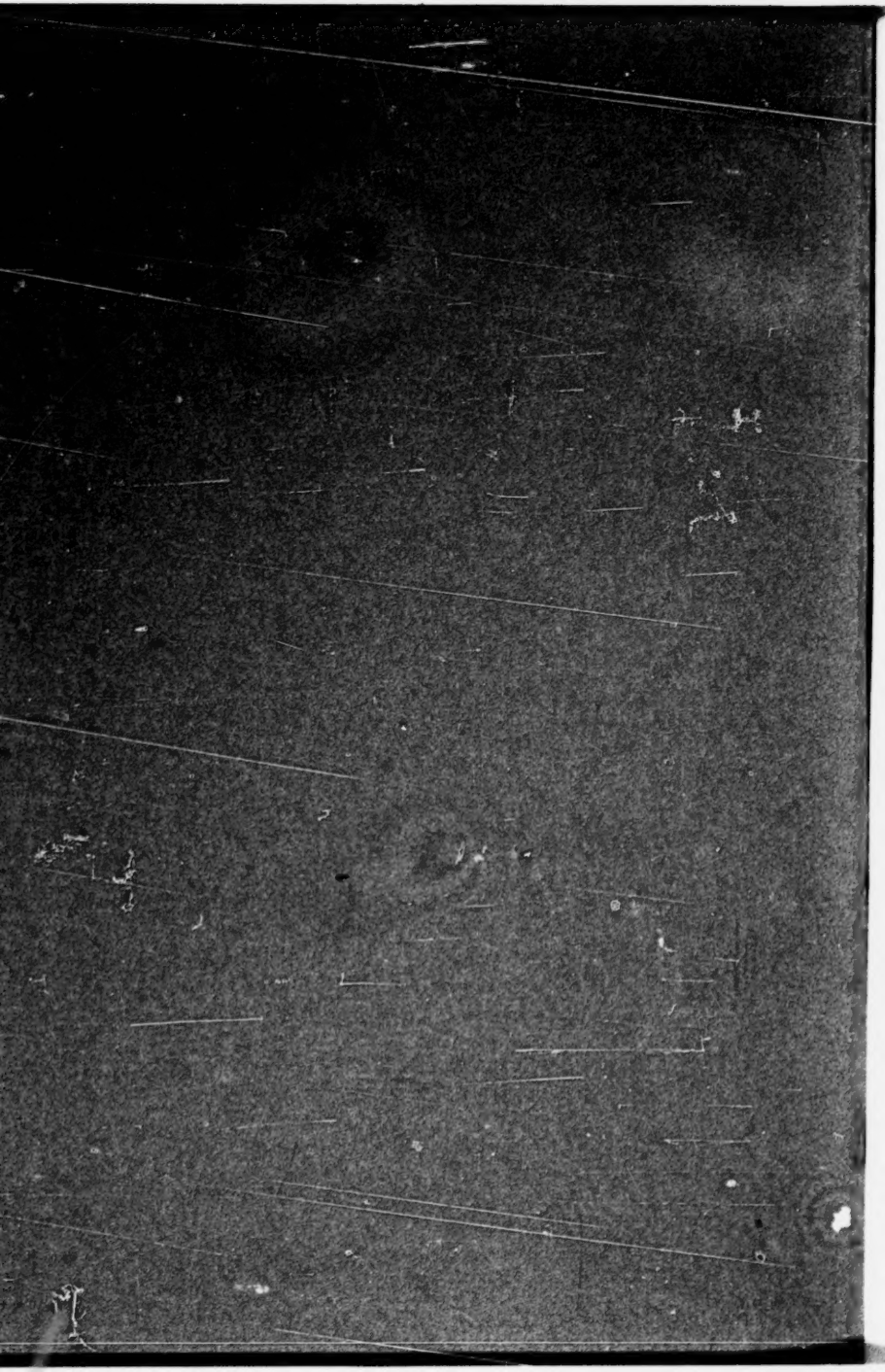
CONCLUSION

For the foregoing reasons and on the basis of the authorities cited herein the petition for certiorari should be granted.

Respectfully submitted,

BOLLING R. POWELL, JR.
Counsel for Petitioner
Powell, Horkan & Powell
815 Connecticut Avenue, N.W.
Washington, D.C.

APPENDIX



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OPINION AND DECISION OF U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

[CAPTION OMITTED]

WIDENER, Circuit Judge:

The question here is whether the defendant, Keith N. Fletcher, may be liable to the plaintiff, American Security and Trust Company (acting as a trustee in bankruptcy), on account of Fletcher allowing one Bruce Noland, a real estate speculator, to use his (Fletcher's) financial statement to present to the bankruptcy court[A1] for its consideration in deciding whether or not to sell certain land to Noland. The issues presented are whether certain of the district court's findings of fact were clearly erroneous and must be set aside, and whether Fletcher's actions in allowing his financial statement to be used by Noland in support of Noland's offer to purchase makes Fletcher liable as a purchaser. We find in favor of the trustee on both issues, and we reverse.

The trustee is a District of Columbia corporation which had acquired title as trustee to the properties of Parkwood, Incorporated, under the terms of Chapter X of the Bankruptcy Act. One of the major properties involved was two adjoining tracts of land located in Fauquier County, Virginia, and known as the North Wales-Ullman property. This property was subject to various secured debts totaling approximately $1,322,000 as of December 31, 1966. The trustee determined that the property should be sold and solicited offers. The best offer it had received as of February 15, 1967 was Noland's offer of $1,665,000.

Noland's offer of $1,665,000 was included in a sales con-

[A1] The U.S. District Court for the District of Columbia.

tract dated February 15, 1967, which provided that the offer would be accepted upon the bankruptcy court's approval of the contract, and that before approval there would be opportunity to receive higher bids. The judge of the bankruptcy court referred the matter for hearing to the referee in bankruptcy as a special master by order entered March 6, 1967. At the special master's hearing on March 30, 1967, additional bids were received for the property. Noland again was the high bidder, offering $1,900,000, with a $5,000 deposit and 30-day closing. The special master, at this hearing, advised the bidders that he desired financial statements of the principals responsible for the bidding to be submitted within a week.[1]

Noland first talked to Fletcher concerning the property on April 12, 1967, and Fletcher gave Noland his financial statement on that date. Noland, on or before April 10, 1967, also had obtained a financial statement from one G. R. Naylor, Jr. By letter dated April 12, 1967, filed in the bankruptcy court on April 13, 1967, Noland submitted his own financial statement and those of Fletcher and Naylor as those of the "principal[s] involved . . . as well as my own financial statements." Noland also attached a paper showing a "total net worth" of $5,143,964 for Fletcher, Naylor and Noland, and two documents purporting to be copies of letters from Noland to Naylor and to Fletcher requesting

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[1] The bids at the hearing of March 30, 1967 were:

Noland—$1,900,000 price, $5,000 deposit, 30 day closing.
Thompson—$1,866,000 price, $15,000 deposit, 90 day closing.
Glassie—$1,800,000 price, 150,000 deposit, 30 day closing.

Financial statements were then submitted, on April 12, 1967, by Noland for himself, Naylor, and Fletcher; and by Glassie for E. Delong Bowman and A. Smith Bowman, Jr. Thompson filed no financial statement.

The financial statements filed in this record show the net worth of Noland to be $971,460.52; of Naylor $1,977,363; and of Fletcher $2,195,140.48.

them as "principals" to furnish their financial statements for forwarding to the bankruptcy court. Both Naylor and Fletcher denied ever receiving the letters.

A hearing was held before the special master concerning creditors' objections to the sale of the North Wales-Ullman property on April 13, 1967. The special master acknowledged that he had received the financial statements of Fletcher, Naylor and Noland, but only Noland was present at the hearings. On May 8, 1967, Noland submitted an additional letter to the bankruptcy court in which he referred to his submission of the financial statements of the "prospective purchasers" as showing assets in excess of $5,000,000. The special master, on May 9, 1967, recommended to the judge that the proposed sale to Noland be approved, and he included with his report, without comment, the financial statements of Noland, Fletcher and Naylor. The report states the special master had "directed" the filing of the financial statements. On May 24, 1967, the bankruptcy court entered its order authorizing the sale of the North Wales-Ullman property to Noland; neither Naylor nor Fletcher was mentioned by name in this order. Also, it is undisputed that neither the bankruptcy court, the special master, nor the trustee had investigated the financial statements of Naylor or Fletcher, nor had they made any inquiry as to Naylor or Fletcher's position in the purchase of these properties. Both the special master and the judge, however, did state they relied on Fletcher's financial statement in recommending and approving the sale.

The closing date of the sale was set for June 23, 1967, at which time Noland defaulted. The trustee agreed to extend the closing until June 29, 1967 if Noland would increase his deposit from $5,000 to $100,000; however, Noland never increased his deposit, and a draft agreement extending the closing was never executed. On June 28, 1967, the trustee's

report on account of the default was submitted to the bankruptcy court.

On June 30, 1967, the trustee wrote identical letters to Naylor and Fletcher, enclosing a copy of the report of default and a copy of a letter sent this same date to Noland. The letter to Noland had his $5,000 deposit enclosed, and stated that the trustee has determined to avail itself of its legal and equitable rights rather than retain the deposit as liquidated damages. At no time prior to the aborted closing did Noland or the trustee ask Fletcher to produce any of the purchase price, and Fletcher was not notified of the closing date. The trustee's letter of June 30, 1967 was its first communication with Fletcher, but it is noted this way was only two days after the trustee reported the default. The trustee filed an application for specific performance and damages against Noland, Naylor, and Fletcher in the bankruptcy court on July 11, 1967.

The bankruptcy court, on September 19, 1967, entered an order in response to a new bid solicited by the trustee for the properties. The order referred the trustee's application for approval of the new contract of sale to the special master for hearing, and notice of the proposed hearing and resale was sent to several persons, including Fletcher. The hearing was held on October 5, 1967. Fletcher was not present at the hearing, and no other bids were received. By order dated October 27, 1967, the bankruptcy court approved the sale of the property to the successful bidder, National Land Company, for $1,700,000.

On February 12, 1971, a summary judgment was entered in the bankruptcy court in favor of the trustee against Noland in the amount of $246,354.54, which has not been satisfied. Fletcher was dismissed from that action because of lack of summary jurisdiction. A third party complaint against Fletcher was also dismissed to preserve Fletcher's right of trial by jury. The trustee then brought this di-

versity action against Fletcher as a co-purchaser with Noland.

The trustee's first contention is that certain of the findings of fact made by the district court are clearly erroneous and must be set aside. FRCP 52(a). The district court found that: (1) there was nothing in the record indicating that the bankruptcy court relied on the financial statement of Fletcher, and that the court was unable to tell whether the special master had so relied in recommending that Noland's offer be approved, (2) there was "no evidence that Noland had any authority to use Fletcher's name or credit in re his bid to purchase the property in question," (3) there was no evidence that anyone thought Fletcher had any interest therein until some time after the resale to National Land Company, (4) Fletcher had received no notice of default prior to the entry of suit against him in the bankruptcy court on July 11, 1967. These findings of fact are clearly erroneous. Indeed, the written terms of the Noland-Fletcher agreement[1A] and the stipulations filed are to the contrary of each of them. The special master stated at a hearing September 27, 1967 he made the recommendation to the judge on the strength of the statements, and his report states his direction they be filed and their inclusion to the judge. The order of the judge entered June 9, 1970 recites its reliance on the financial statement of Fletcher. The Noland-Fletcher agreement itself is evidence of Noland's authority to use Fletcher's name and credit in the purchase of the property. The trustee notified Fletcher of the default on June 30, 1967, and instituted action against him for damages on July 11, 1967. Fletcher was notified of the resale offer and hearing thereupon. Again, the district court's finding that there was no evidence that anyone thought Fletcher had an interest until after the resale is clearly

[1A] The written agreement appears in full as note 2.

erroneous because the special master stated he had relied on Fletcher's statement, and the trustee had notified him of Noland's default, had sued him, and he had been notified of the resale and the hearing thereupon; all of these events transpiring at least weeks prior to the order approving resale.

In this diversity case, the forum being Virginia, and nothing to the contrary appearing in the record, the law of Virginia should apply. *Klaxton Co.* v. *Stentor Co.*, 313 U.S. 487 (1941); *Moreland* v. *Moreland*, 108 Va. 93, 60 S.E. 730 (1908); *Waggaman* v. *General Finance Co.*, etc. 116 F(2d) 254 (3rd Cir. 1940).

Under Virginia law, it is clear that Fletcher should be estopped to deny that he was a co-purchaser of the properties. Construing the evidence most favorable to Fletcher would indicate that Noland duped him into believing that he would be a mere straw man in the transaction, and would be paid $50,000 only for allowing Noland to use his (Fletcher's) financial statement (to misrepresent the facts to the court in order to buy the land), and (by purchase from Noland) to put the land temporarily in his (Fletcher's) name. Noland also promised Fletcher that he would not be obligated in any way.[2] However, none of this changes the

[2] Fletcher's agreement with Noland dated April 12, 1967, handwritten by Noland, reads as follows:

"I, Bruce Noland, do hereby promise to pay Keith N. Fletcher $50,000 for the use of his financial statement in the purchase of the North Wales and Ullman properties located at Fauquier County, Virginia.

"This statement will be presented along with Roger Naylor's and my own statement to the Referee in Bankruptcy, John A. Bresnahan.

"My use of Keith N. Fletcher's financial statement is not intended to obligate Mr. Fletcher in any way whatsoever regarding the purchase or resale of any of the above property.

"If for any reason the Court does not award the sale of the above property to me, then this agreement shall be null and void.

/s/ Bruce Noland"

fact that Fletcher knew his financial statement would be used in purchasing the properties, it "will be presented . . . to the Referee in Bankruptcy," and knew the statement did not state any restriction on such use. Noland, of course, for obvious reasons, did not present the Fletcher agreement to the bankruptcy court.

In Virginia, the necessary elements of estoppel are: (1) there must have been a false representation or concealment of material facts; (2) the representation must have been made with the knowledge of the facts; (3) the party to whom it was made must have been ignorant of the truth of the matter; (4) it must have been made with the intention that the other party should act upon it; and (5) the other party must have been induced to act upon it. E.g., *Coleman v. Nationwide Life Insurance Company*, 211 Va. 579, 179 S.E.(2d) 466 (1971).

A consideration of the facts of this case, viewed in the light most favorable to Fletcher, reveals that Fletcher is estopped to deny his status as a purchaser of the property. It is admitted that Fletcher, for the stated consideration of $50,000, signed a financial statement knowing that it was to be used by Noland in the purchase of the property from the bankruptcy court and that it would be presented to the referee in banckruptcy. The material fact that Fletcher concealed from the statement was that he would not be obligated "in any way whatsoever regarding the purchase or resale" of the property; rather this was taken care of in the side agreement with Noland. Although Fletcher's present version of the matter is at some variance with the terms of his written agreement with Noland, it is undisputed that he was to be a silent partner in the purchase (he now contends he was to take the title to the property from Noland to hold as surety for his $50,000 consideration for the use of his financial statement).

It is undenied that the bankruptcy court was ignorant of the truth of the entire matter: the side agreement between Fletcher and Noland was never presented to the court. It is apparent from the agreement itself that it was intended that the bankruptcy court act on the financial statement: "This statement will be presented, along with Roger Naylor's and my own statement, to the Referee in Bankruptcy, John A. Bresnahan." The bankruptcy court, in fact, was induced to act upon the statement: it approved the sale to Noland, and the special master and the judge have acknowledged their reliance on the financial statement, it having been specifically requested by the special master. Any contention that Fletcher did not intend the bankruptcy court to act upon his financial statement is patently without merit. The contract provides that if Noland was not awarded the property by the bankruptcy court, then Fletcher would not receive his $50,000 payment. This whole scheme smacks of a rather apparent device to conceal from the bankruptcy court the true facts surrounding the purchase of the property, which has resulted in a loss to the creditors. Fletcher's position, according to the written agreement with Noland, is that for the consideration of $50,000 he would allow Noland to use his financial statement in the procurement of the property. If the bid were successful, he would receive $50,000 from Noland and not have any liability as to the purchase. In all events, *Fletcher was to be paid, then, for the use of his statement,* and if Noland misused the statement, which Fletcher had signed for a stated $50,000 consideration, Fletcher has only himself to blame and may not have the creditors of the bankrupt estate milched out of their rights in a sale believed by the court to be bona fide.[3]

[3] In *Thomasson* v. *Walker,* 168 Va. 247, 190 S.E. 309, 313 (1937), is found a principle equally applicable to this case: "The general rule of equitable estoppel, or, as it is frequently called, 'estoppel in pais,'

Neither may he abuse the processes of the court with impunity. Had the financial statement been given by Fletcher without consideration, for example as an accommodation, the matter would be serious enough. For a stated consideration of $50,000, his conduct is inexcusable.

The district court appears to have been impressed by the fact that the trustee did not rely on Fletcher's statement. That facet of the case presents no difficulty for the financial statement in question was requested by the special master, not the trustee. While it is true the trustee is an officer of the court, so also is the special master, who acted here to hear and recommend to the court. Furthermore, the portion of the act applicable to corporate reorganizations specifically requires the judge's approval of all leases or sales of the debtor's property. The trustee, then, is at no time more than an agent of the court, and the court makes the decision on whether or not to sell the property.[4] The failure of the trustee to rely on the financial statement is no excuse for the misrepresentation to the court, and concealment from it, of the true facts concerning the purchase.

To summarize, the trustee had solicited bids for the property, prepared a tentative agreement to sell to Noland, the highest bidder, if the court approved the offer, and then

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is that when one person, by his statements, conduct, action, behavior, concealment, or even silence, has induced another, who has a right to rely upon those statements, etc., and who does rely upon them in good faith, to believe in the existence of the state of facts with which they are compatible, and act upon that belief, the former will not be allowed to assert, as against the latter, the existence of different state of facts from that indicated by his statements or conduct, if the latter has so far changed his position that he would be injured thereby." See also the language in *Maryland Casualty Company* v. *Craig*, 213 Va. 660, 194 S.E.(2d) 729, 732 (1973): "One who deals with an agent and has no knowledge of any limitations upon his power may deal upon the faith of his ostensible powers, whether this agency be general or special."

[4] 11 U.S.C. § 75(a); 11 USC § 516(3); FRCP 53.

submitted the proposed agreement with Noland along with information pertaining to the other bids to the court. The court then referred the matter to the referee in bankruptcy, acting as a special master, for hearing and to receive additional bids. At this point, the matter was out of the trustee's hands. The special master did receive other bids, forcing Noland to raise his offer, and at the end of the bidding, the special master (for the first time in the negotiations) asked for the principals' financial statements. Noland then talked to Fletcher and acquired his financial statement, which he presented to the special master on the following day. It is a matter of record that the special master did consider Fletcher's financial statement in recommending approval of Noland's bid.[5] The special master then recommended to the court that Noland's bid be accepted, and the court, also considering Fletcher's statement, approved the special master's recommendation.

The special master and the court having relied on Fletcher's statement, which he intentionally submitted for that purpose, Fletcher became estopped to deny his status as a co-purchaser of the property.

Accordingly, the judgment of the district court must be reversed with instructions to enter judgment for the plaintiff in a proper amount.

REVERSED.

January 21, 1974

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[5] Although the record does not show how much weight the special master and the court placed on Fletcher's statement, it is only logical to assume that they were more impressed by statements showing a total net worth of over $5,000,000 than they would have been by Noland's net worth alone of $971,460 against a $1,900,000 bid.

ORDER OF U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING

[CAPTION OMITTED]

ORDER

Upon the suggestion for rehearing en banc, no judge entitled so to do having requested a poll of the Court; and,

Upon consideration of the petition for rehearing, the panel being of the opinion it is without merit;

It is accordingly Adjudged and Ordered that the petition for rehearing shall be, and the same hereby is, denied.

With the concurrences of Judge Craven and Judge Butzner.

Widener, J.
For the Court

May 13, 1974

OPINION AND ORDER OF U.S. DISTRCT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

[CAPTION OMITTED]

MEMORANDUM OPINION AND ORDER

This suit grew out of Bruce Noland's failure to make settlement for the purchase of the North Wales and Ullman tracts of land from the District of Columbia trustee in the reorganization of Parkwood, Incorporated.

The trustee seeks to recoup the reorganization estate's loss of some $250,000.00 from Keith Fletcher on the ground that Fletcher was an undisclosed principal and/or joint venturer with Noland in the purchase of the said land.

Fletcher was first sued in connection with this matter when the trustee filed application for specific performance against Noland, Naylor and Fletcher in the United States

Bankruptcy Court in the District of Columbia on July 11, 1967.

In dismissing the application on April 22, 1968, the Honorable Oliver Gasch, speaking for the Bankruptcy Court, noted that

> "The alleged status of Fletcher and Naylor as 'purchasers' of these properties is founded primarily in the use of their financial statements in connection with the contract of sale ultimately approved by the Court.
>
> * * *
>
> ". . . the Court has reservations over the propriety of such a procedure (summary jurisdiction) in a case where the alleged status of individuals as purchasers involved close complex issues and is based to such extent on tenuous concepts of apparent authority."

The Court made it clear, however, that its opinion in dismissing the application was not an adjudication of the merits of the trustee's claim against Fletcher and Naylor.

On February 12, 1971 Judge Gasch entered judgment against Noland for $246,354.54.

The trustee is now attempting to collect that judgment by chancery suit filed against Noland and others in the Circuit Court of Fauquier County, Virginia—He has also docketed the judgment in this court—Execution thereon has been returned unsatisfied.

This suit against Fletcher followed—Fletcher made Noland a third party defendant.

From the evidence here presented, consisting of the stipulation of facts; the exhibits; certain pretrial depositions; and the live testimony of the trustee, the defendant Fletcher and several other minor witnesses—

The Court finds:

That Bruce Noland and the trustee for the reorganization of Parkwood, Incorporated, entered into a written contract dated February 15, 1967 for the purchase and sale of the North Wales and Ullman tracts for the sum of $1,665,000.00, subject to the approval of the Banbruptcy Court of the District of Columbia.

The trustee submitted the Noland offer to the Bankruptcy Court for approval on February 27, 1967—The matter was then referred to the referee in bankruptcy, as special master, for hearing. Hearing was set for March 30, 1967—The special master was directed to notify all persons who had an interest in the reorganization of Parkwood, Incorporated, of the Noland offer and that additional bids would be received at the hearing.

Noland's offer to purchase the tracts was announced at the March 30th hearing—Three other bids were then taken—

(a) Noland, $1,900.000.00, $5,000.00 deposit, thirty-day closing;

(b) Thompson, $1,866,000.00, $15,000.00 deposit, ninety-day closing; and

(c) Glassie, $1,800,000.00, $150,000.00 deposit, thirty-day closing.

At the close of the bidding Glassie announced that he was representing the Bowmans and that he was prepared to submit their financial statement for consideration by the Court—The special master thought that was a good idea—The three bidders then agreed they would submit their financial statements within the week.

A hearing on creditors' objections to the proposed sale was held on April 13, 1967—The special master announced

at this meeting that he had received the financial statements of the bidders.

On May 9, 1967 the special master recommended that the Noland offer be approved. In his report he stated that he had directed those bidding, or the principals whom they represented, to file financial statements. The financial statements, including Naylor's and Fletcher's, were submitted with the report without comment.

On May 17, 1967 the Bankruptcy Court entered an order directing the trustee to send notice of the proposed order authorizing the sale to Noland to all interested parties —This order did not mention Naylor or Fletcher—Neither was sent a copy of the notice.

The Bankruptcy Court approved the sale to Noland on May 24, 1967. Fletcher was neither mentioned in the order or sent a copy thereof.

Settlement was scheduled for June 23, 1967—Noland failed to tender the purchase price—The trustee's representative then stated he would extend the closing until June 29th if Noland would increase his deposit from five to one hundred ninety thousand dollars—Noland's counsel countered by offering to increase the deposit to $100,000.00. The trustee agreed, if the deposit were put up by two thirty on the 23rd.

The parties met again at two o'clock on the 23rd and Noland's counsel stated that he was unable to raise the funds and asked for more time, namely, until the following Monday.

Settlement was never had and the default was reported to the Bankruptcy Court on June 28, 1967.

The trustee then proceeded to resell the property by placing ads in the newspapers and by contacting the former bidders and other interested parties.

The National Land Company offered to buy the properties for $1,700,000.00—Hearing on the resale offer was had October 5, 1967. Fletcher was sent a notice of this hearing—Nothing therein indicated that the property was being resold at his expense.

The special master recommended approval of the resale to the National Land Company on October 11, 1967—A copy of this report was served on Fletcher—The resale was approved by the Court on October 27, 1967.

Fletcher knew nothing about Noland's negotiations with the trustee or his representations to the special master in re Noland's purchase of the North Wales and Ullman tracts until late in the afternoon of April 12, 1967. (He had heard that Noland had purchased the property and had seen Noland's "For Sale" sign on the property some time in early April.)

Noland told Fletcher on April 12th that he had resold the Ullman farm to a Van Roijen for $300,000.00 and that he had sold the North Wales mansion house and about three hundred acres to one Naylor for $1,300,000.00, and that he had about twenty-six hundred acres left to resell and that he needed $300,000.00 in addition to what Van Roijen and Naylor would pay him to meet the $1,900,000.00 purchase price he had agreed to pay the trustee.

Noland offered to resell the twenty-six hundred acres to Fletcher for $300,000.00 and agreed to divide the land into parcels and resell the property to others if Fletcher would agree to buy the land. He further agreed to guarantee Fletcher a $50,000.00 profit on the transaction.

Noland also told Fletcher that he could pay the $300,000.00 by assuming the $300,000.00 deed of trust note held by the Metropolitan Life Insurance Company, one of the creditors in the bankruptcy proceeding, but that he would have to show Metropolitan that his net worth was sufficient to guarantee payment of the note.

Fletcher agreed to Noland's proposal because he did not see how he could lose any money. He then gave Noland a signed copy of his financial statement for the purpose of satisfying the Bankruptcy Court and the Metropolitan Life Insurance Company of his financial ability to assume and service the $300,000.00 owed Metropolitan.

Noland then wrote the following memorandum and gave it to Fletcher:

> "April 12, 1967
>
> "I, Bruce Noland, do hereby promise to pay Keith N. Fletcher $50,000.00 for the use of his financial statement in the purchase of the North Wales and Ullman properties located at Fauquier County, Virginia.
>
> "This statement will be presented along with Robert Naylor's and my own statement to the Referee in Bankruptcy, John A. Bresnahan.
>
> "My use of Keith N. Fletcher's financial statement is not intended to obligate Mr. Fletcher is any way whatsoever regarding the purchase or resale of any of the above property.
>
> "If for any reason the Court does not award the sale of the above property to me, then this agreement shall be null and void.
>
> /s/ Bruce Noland"

The record here made further discloses that Noland did attempt to sell Naylor the mansion house and some three hundred acress for around one million dollars and that he did attempt to get Naylor favorable financing for the purchase of the property—Noland got Naylor's financial statement for this purpose.

Noland proceeded to send Naylor's financial statement to the special master by letter dated April 12, 1967 together with a copy of his letter of March 3, 1967 to Naylor advising him that the special master had requested that he submit by April 13th a financial statement of all principals involved in the purchase of the North Wales and Ullman tracts.

Naylor is now deceased. He denied in his pretrial deposition that he had ever received the March 3rd letter. (It should be noted that March 3rd was twenty-seven days prior to the date the special master had requested submission of financial statements by the principals.)

Naylor also testified that he never knew that Noland had filed his financial statement with the special master until the trustee's application for specific performance and damages was served on him in July of 1971.

There is nothing in the trustee's reports to the special master or to the Bankruptcy Court indicating he ever heard of Fletcher or Naylor prior to April 12th.

It is also significant that neither the trustee nor the special master ever notified Fletcher that he had been approved by the Court as the purchaser of the property in question or of the date of settlement therefor, nor of the default nor of the resale, or that they considered or expected to hold him responsible for any losses sustained in connection therewith prior to the trustee's application for specific performance and damages filed against Fletcher on July 11, 1971.

It is also significant to note that Fletcher's name is not mentioned anywhere in the order approving the sale to Noland or in the deed conveying the land to Noland.

The trustee, in testifying before this Court, was frank and honest—He unequivocally stated that all of his dealings in re the sale of Parkwood's property were with Noland—He did not rely upon Fletcher's financial statement in

recommending that Noland's bid be accepted—He thought he was selling the property to Noland and to no one else.

We do not know whether the special master relied on Fletcher's financial statement in recommending that Noland's offer be approved. His reports are silent on the subject—and he was not called to testify—We do know he never talked to Fletcher or sent him word that he would be held responsible for Noland's performance of the contract.

Facially, there is nothing in this record indicating that Fletcher was the purchaser of the property in question.

Further, there is nothing in this record indicating that the Bankruptcy Court relied on the financial statement of Fletcher in approving the trustee's and the master's recommendations that Noland's offer to purchase the property be approved.

Noland was in the courtroom during this trial. He was not called to state what interest, if any, he claimed Fletcher had in the purchase.

Surely the trustee can rise no higher than his own testimony—His belated contention that Fletcher was an undisclosed principal and/or joint venturer with Noland in the purchase of the said property is totally lacking in evidentiary support—The burden is upon him to so prove—This he has failed to do.

Proof that the special master got Fletcher's financial statement from Noland is not enough—There is no evidence that Noland had any authority to use Fletcher's name or credit in re his bid to purchase the property in question—or that anyone thought Fletcher had any interest therein until some time after the resale to National Land. Had the trustee, special master or the Bankruptcy Court so believed, surely Fletcher would have been advised of Noland's default.

The property was sold to Noland—He defaulted in settlement—The property was resold to National Land—The trustee has obtained judgment against Noland for the loss to the reorganization estate—He must look to Noland alone for the collection of the judgment.

The suit against Fletcher should be dismissed, and

It Is So Ordered.

The Clerk will send a copy of this memorandum opinion and order to counsel of record.

/s/ Oren R. Lewis
United States District Judge

December 15, 1972

A True Copy, Teste:
W. Farley Powers, Jr., Clerk
By /s/ B. V. Brownell, Jr.
Deputy Clerk

11 USC § 586

§ 586. Appointment of trustees; continuance of debtor in possession. Upon the approval of a petition, the judge shall appoint one or more trustees. Any trustee appointed under this section shall be disinterested and shall have the qualifications prescribed in section 73 of this title, except that the trustee need not reside or have his office within the district. If the indebtedness of a debtor, liquidated as to amount and not contingent as to liability, is $250,000 or less, the judge may appoint one or more such trustees or he may continue the debtor in possession. In any case where a trustee is appointed the judge may, for the purposes specified in section 589 of this title, appoint as an additional trustee a person who is a director, officer, or employee of the debtor.

July 1, 1898, c. 541, § 156, as added June 22, 1938 c. 575, § 1, 52 Stat. 888.

11 U.S.C. § 73

§ 73. *Receivers and trustees; qualifications*—Receivers and trustees shall be (1) individuals who are competent to perform their duties and who reside or have an office in the judicial district within which they are appointed; or (2) corporations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed. July 1, 1898, c. 541, § 45, 30 Stat. 557; June 22, 1938, c. 575, § 1, 52 Stat. 860.

28 U.S.C. § 959(b)

§ 959. *Trustees and receivers suable; management; State law*—(b) A trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

June 25, 1948, c. 646, 62 Stat. 926.

CODE OF VIRGINIA (1950 AS AMENDED) § 6.1-5

§ 6.1-5. *Who shall not do a banking or trust business.*—No person, copartnership or corporation, except corporations duly chartered and already conducting the banking business or trust business in this State under authority of the laws of this State or the United States, or which shall hereafter be incorporated under the laws of this State or authorized to do business in this State under the banking

laws of the United States, shall engage in the banking business or trust business in this State, and no foreign corporation shall do a banking or trust business in this State; except that nothing in this chapter shall:

(1) Prevent a natural person from qualifying and acting as trustee, personal representative, guardian, committee or in any other fiduciary capacity,

(2) Prevent any person or copartnership or corporation from lending money on real estate and personal security or collateral, or from guaranteeing the payment of bonds, notes, bills and other obligations, or from purchasing or selling stocks and bonds, or

(3) Prevent any bank or trust company organized under the laws of this State from qualifying and acting in another state or in the District of Columbia, as trustee, personal representative, guardian or committee or in any other fiduciary capacity, when permitted so to do by the laws of such other state or District.

Nothing in this section shall be construed to prevent banks or trust companies organized in this State and chartered under the laws of the United States from transacting business in Virginia. (Code 1950, § 6-9; 1960, c. 384.)

CODE OF VIRGINIA (1950 AS AMENDED) § 13.1-119

§ 13.1-119. *Transacting business without certificate of authority.* —No foreign corporation transacting business in this State without a certificate of authority shall be permitted to maintain any action, suit or proceeding in any court of this State, until such corporation shall have obtained a certificate of authority. No foreign corporation which is in default under the requirement that amendments

to its articles of incorporation or instruments of merger or consolidation shall within thirty days be filed in the office of the Commission shall be permitted to maintain any action, suit or proceeding in any court of this State until such corporation shall have filed in the office of the Commission a copy of such amendments or instruments of merger or consolidation authenticated as aforesaid.

The failure of a foreign corporation to obtain a certificate of authority to transact business in this State shall not impair the validity of any contract or act of such corporation, and shall not prevent such corporation from defending any action, suit or proceeding in any court of this State.

If a foreign corporation transacts business in this State without a certificate of authority, its directors, officers and agents doing such business shall be jointly and severally liable for any contracts made or to be performed in this State and any torts committed in this State between the time when it began to transact business in this State and the date when it obtains a certificate of authority. In suits against it by service of process on any such director, officer or agent of the corporation, or, if none can be found, on the clerk of the Commission. If any foreign corporation shall transact business in this State without a certificate of authority, it shall by transacting such business be deemed to have thereby appointed the clerk of the Commission its attorney for service of process. Service shall be made by leaving two copies of the process, notice, order or demand, together with the fee required by law, in the office of the clerk of the Commission, together with an affidavit giving the latest known post-office address of the defendant and such service shall be sufficient if notice of such service and a copy of the process, notice, order or demand are

forthwith sent by registered mail, with return receipt requested, by the clerk of the Commission or one of his staff to the defendant at the specified address. An affidavit by the clerk of the Commission showing compliance herewith shall be filed with the papers in the suit, action or proceeding.

If a foreign corporation transacts business in this State without a certificate of authority, each officer, director and agent who does any of such business in this State shall be liable to a penalty of not less than one hundred dollars or more than one thousand dollars to be imposed by the Commission after notice and opportunity to be heard, both to the corporation and to the individual. Code 1950, § 13-218; 1956, c. 428.)

STIPULATION FILED IN U.S. DISTRICT COURT

[CAPTION OMITTED]

STIPULATION

Plaintiff American Security and Trust Company (hereafter "the Trustee") and Defendant Keith N. Fletcher (hereafter "Fletcher"), by their respective counsel, expressly reserving the right to object on grounds of materiality, competency, or relevancy, hereby stipulate to the truth of the following:

1. American Security and Trust Company was appointed Trustee in Reorganization, under Chapter X of the Federal Bankruptcy Act, of Parkwood, Incorporated, by the United States District Court for the District of Columbia (hereinafter the "Bankruptcy Court") on June 13, 1966. On July 8, 1966, it was appointed Trustee in Reorganization of corporations affiliated with Parkwood. The Trustee took all the steps prescribed by the Orders of June

22 and July 8, 1966, as requirements for its qualification as a Trustee in Reorganization, and on July 12, 1966, the Trustee's bond was approved by the Bankruptcy Court and the Court declared that under the terms of the orders of the Court appointing it, Plaintiff was duly qualified as Trustee in Reorganization of Parkwood and affiliated corporations. It has continued to act in that capacity since then and continues to so act at this time. After holding the hearing required by Sections 161 and 162 of the Bankruptcy Act (11 U.S.C. Sec. 561 and Sec. 562), at which objections could have been made, but were not, that the Trustee was not duly qualified to act as such, the Bankruptcy Court entered an order retaining the Trustee in office, dated August 12, 1966.

2. The Trustee is a District of Columbia corporation and is not now, nor has it ever been, qualified to do business in Virginia as a corporate trustee.

3. One of the major properties owned by Parkwood, Incorporated, title to which the Trustee succeeded under the terms of the Bankruptcy Act and the Order of the Bankruptcy Court appointing the Trustee, was certain property in Fauquier County, Virginia, known as North Wales, consisting of approximately 3200 acres of woodland and pasture, a manor house and various outbuildings. Contiguous to North Wales was another property owned by Parkwood known as the Ullman Farm, consisting of approximately 504 acres of farmland, a house, an assorted outbuildings. The two properties are known collectively as the North Wales—Ullman property.

4. This property was subject to deeds of trust, accrued interest and unpaid taxes in the aggregate amount as of December 31, 1966 of approximately $1,322,000. Carrying charges on the property exceeded income from the prop-

erty. For these reasons, and because the Trustee required cash to continue the day-to-day operation of the reorganization estate, the Trustee decided to sell the property. The Trustee contracted more than 25 persons concerning the possibility of sale. The best offer it had received as of February 15, 1967, was an offer of Bruce Noland to pay $1,665,000 with a $5,000 deposit.

5. Tis offer was embodied in a sales contract dated February 15, 1967. This contract provided, *inter alia*, that the Trustee could not accept the offer without approval of the Bankruptcy Court to do so, that an order of the Bankruptcy Court approving the contract would constitute acceptance of it, and that before the Bankruptcy Court could approve the contract opportunity had to be afforded other persons to make better offers. The contract also provided for closing within 30 days of approval by the Bankruptcy Court.

6. The contract did not provide that it was assignable in whole or in part by Noland or that the rights and obligations thereunder were vested in Noland's heirs, assigns, or successors in interest.

7. The Trustee applied to the Bankruptcy Court for approval of the Noland contract (unless a better offer were received) by Application dated February 27, 1967. The Trustee's Application refers throughout to "the Noland offer" and at no place is there any express statement that Noland was acting for anyone but himself.

8. By Order of the Bankruptcy Court entered March 6, 1967, the Trustee's Application for approval of the February 15, 1967 contract was referred to the Referee in Bankruptcy as Special Master for hearing. The Order also directed the Trustee to give notice "of the receipt of the No-

land offer" to all persons who had an interest in the reorganization estate.

9. Noland showed the late G. Rodgers Naylor, Jr. (hereafter "Naylor") the North Wales mansion and surrounding acreage before March 30, 1967, and Naylor expressed interest in purchasing the mansion and about 300 surrounding acres. As of March 30, 1967, no agreement had been reached between Noland and Naylor concerning the purchase of the mansion and surrounding acreage, nor had they reached an agreement as to the price of the house and surrounding acreage.

10. Before March 30, 1967, Noland also approached Robert Van Roijen, a landowner in the Warrenton area, and tried to sell him the Ullman Farm for about $300,000.

11. On March 30, 1967, a hearing was held before the Special Master on the Trustee's Application for approval of the contract of February 15, 1967. As of March 30, 1967, Fletcher was unaware of such a hearing. Naylor was aware of the hearing, having been told of it by Noland.

12. Approximately forty-five persons attended the March 30, 1967 hearing, including Bruce Noland, Henry H. Glassie (representing the Bowman brothers), and Bryce Thompson. Neither Fletcher nor Naylor was present, and no one at the hearing expressly stated that he represented either Fletcher or Naylor.

13. The Special Master stated that the purpose of the hearing was "to consider the application of the Trustee for authority to accept an offer by one, Mr. Noland, to purchase North Wales and the Ullman Tract." The Trustee had previously advertised that bids would be received at the hearing for the properties. The Special Master received bids from Messrs. Noland, Glassie, and Thompson.

14. There is nothing in the transcript of the hearing to indicate that Noland was bidding on behalf of anyone but himself. Noland specifically referred to his bid as "my offer."

15. At the conclusion of the bidding, the three bids were:

a. Noland—$1,900,000 price, $5,000 deposit, 30-day closing

b. Thompson—$1,866,000 price, $15,000 deposit, 90-day closing

c. Glassie—$1,800,000 price, $150,000 deposit, 30-day closing.

16. Following the conclusion of the bidding, Glassie stated that he would be prepared to submit the Bowmans' financial statements for consideration by the Court. The Special Master thereupon said:

> "I am glad you mentioned that, Mr. Glassie. Sitting here thinking about the report that I will have to make on this, it would be well to submit to the Judge financial statements on the principals who are going to be responsible for this. How long would it take you to get that together?"

Each of the three bidders agreed to submit his statements to the Special Master within a week.

17. Noland met with Fletcher concerning the North Wales and Ullman properties at about 10:00 p.m. on the evening of April 12, 1967, at Fletcher'office in his bowling alley in Warrenton, Virginia. This was the first time Noland and Fletcher ever discussed the property.

18. On the evening of April 12, 1967, Fletcher gave Noland his financial statement signed by him.

19. Noland has testified that between March 30, 1967, and April 12, 1967, he continued to try to sell the North Wales mansion and 300 acres to Naylor, now offering this property to Naylor for $1,000,000. Naylor testified that Noland also tried to sell Naylor all the properties (North Wales and Ullman); that Noland offered to get Naylor favorable financing for this purchase from a money lending institution; that Noland asked Naylor to give him his financial statement for this purpose; that he gave Noland his financial statement for this purpose; that he also gave Noland a letter dated April 10, 1967 stating "[the financial] statement is presented to you in confidence;" and that this letter was attached to the financial statement by a paper clip.

20. Naylor testified that between March 30, 1967 and April 12, 1967, Noland never told him of the Special Master's request for financial statements of the principals in the purchase of the properties from the Trustees; that he never authorized Noland to submit his financial statement to the Court; and that he did not know Noland had filed it with the Court until the Trustee's application for damages was served on him in July 1971. Noland has testified that when Nayor gave him his financial statement he did not limit Noland's use of it and that he had advised Naylor he was going to submit the financial statement to the Court in response to the Special Master's request.

21. By letter dated April 12, 1967, filed in the Bankruptcy Court on April 13, 1967, Noland submitted his own financial statement and those of Fletcher and Naylor as those of the "principal [sic] involved." Accompanying Noland's letter was a paper totaling the three financial statements to show a "total net worth" of $5,143,964 for Fletcher, Naylor and Noland. Also accompanying No-

land's letter of April 12 were documents purporting to be copies of letters from Noland to Naylor and to Fletcher requesting them as "principals" to furnish their financial statements for forwarding to the Bankruptcy Court.

22. In his letter of April 12, 1971 to the Special Master, Noland stated in part:

> "I have been led to believe that the Trustees are considering taking other than the high bids that you received in the court room. It is hard for me to conceive of such action, namely because they are leaving themselves wide open for legal action from the creditors as well as myself.
>
> "Since my bid was high for the property, I trust that you will see fit to award the sales contract to me."

23. On April 13, 1967, a hearing was held before the Special Master on creditors' objections to the sale of the North Wales and Ullman properties on the grounds that the interests of the reorganization estate would be best served if the properties were not sold at that time. Noland was among those present. Neither Fletcher nor Naylor was present. The Special Master acknowledged at this hearing that he had received the financial statements of Fletcher, Naylor, and Noland. Nobody present questioned Noland or introduced any evidence as to the status of Naylor or Fletcher in the matter, or as to the bona fides of the Noland, Naylor and Fletcher financial statements and the accuracy of the facts, values and figures shown in these financial statements.

24. On May 8, 1967, Noland submitted an additional letter to the Bankruptcy Court in which he referred to his submission of the financial statements of the "prospective purchasers" from the Bankruptcy Court as showing assets

in excess of $5,000,000, a figure that necessarily included the assets of Fletcher as well as his own.

25. In his letter of May 8, 1967 Noland stated in part:

> "My bid was the highest taken in the Court. At this particular hearing [held March 30] you requested certain financial information to be furnished to you pertaining to the prospective purchasers. I complied with this request on April 12, 1967 furnishing you statements showing assets in excess of $5,000,000.00. . . .
>
> "In a letter to you dated April 12, 1967 I stated that it was my opinion that the Trustees [sic] were considering recommending the sale to other than the highest bid, which was mind. . . .
>
> "As stated in my April 12th letter it was my opinion the Trustees had considered other than the highest bid. Since then in various discussions with the Trustees they seem very interested in selling the property to a gentleman whose bid was $100,000.00 under my bid, simply because he is very wealthy and connected with the whiskey business. I do not know what his deposits or his brewery's deposits are in Washington banks; however, I am led to believe they are considerable. Regardless of what they are I do not believe this should enter the Court's decision one way or the other because the record will show the property to be sold according to my contract."

26. On May 9, 1967, the Special Master rendered his Report to the Court on the Trustees' Application for authority to accept Noland's offer. The Special Master recommended that the "proposed sale to the high offerer, Mr. Bruce Noland, . . . be approved." The Special Master reported that at the March 30, 1967, hearing:

> "Higher offers were made by Henry Glassie Esq. on behalf of E. DeLong Bowman and A Smith Bowman, Jr.; by H. Bryce Thompson IV on behalf of himself and other undisclosed principals, and Bruce Noland on behalf of himself."

In the Report the Special Master stated he "directed the parties actively engaged in submitting offers, or the principals whom they represented, to file financial statements." The Report further stated:

> "Financial statements were filed by A Smith Bowman, Jr., and E. Delong Bowman; and by Bruce Noland, G. Rodgers Naylor, Jr., and Keith N. Fletcher; but Mr. Thompson failed to file one. These statements are submitted with this Report without comment."

27. On May 17, 1967 the Bankruptcy Court entered an Order directing the Trustee to send a Notice of proposed Order authorizing the sale of North Wales and Ullman properties to Noland to all parties interested in the reorganization estate. This Order did not mention Naylor or Fletcher by name.

28. On May 24, 1967 the Bankruptcy Court entered its Order authorizing the sale of North Wales and Ullman Farm to Noland. Neither Naylor nor Fletcher was mentioned by name in the Order. The Order recites in part:

> ". . . it appearing . . . that copies of said Report [of the Special Master] have been served on all parties in interest, that notice has been given to all parties in interest of the Court's intention . . . to enter this Order (of which copies have been furnished to all such parties). . . ."

29. Between April 13, 1967 and May 24, 1967, neither the Trustee nor anyone else made an investigation to determine whether the financial statements of Naylor and Fletcher submitted by Noland to the Court were bona fide, whether the financial statements of Naylor and Fletcher accurately reflected their financial conditions, or whether Naylor or Fletcher had authorized Noland to file their financial statements with the Special Master, and, if so, for what purpose. At no time between April 13, 1967 and May 24, 1967 did the Trustee or the Special Master make any inquiry, either orally or in writing, of Fletcher to determine what position, if any, he had in the purchase of these properties.

30. Under the terms of the contract for the sale of the properties approved by the Court in its Order of May 24, 1967, the closing on the sale of the properties was to be held June 23, 1967. At no time prior to the closing, or thereafter, did Noland ask Fletcher to produce all or any part of the purchase price, to assume any deed of trust on the properties, or to assume any other obligations or responsibilities whatever with respect to the purchase of the properties.

31. At some time prior to the scheduled June 23, 1967, closing the Trustee had come to suspect that Noland might encounter difficulties in obtaining sufficient money to close the sale.

32. At the settlement meeting held on the morning of June 23, 1967, between Noland and representatives of the Trustee, Noland failed to tender the purchase money and the contract was thereupon in default.

33. At no time prior to the closing or on the occasion of the closing did the Trustee either notify Fletcher of the

closing, or forward to Fletcher a draft of the proposed deed, or ask Fletcher who should be named in the deed as grantees, or demand that Fletcher pay all or any part of the purchase price. By letter dated June 19, 1967, the Trustee wrote Noland notifying him of the time and place of the closing and the form of payment, and enclosing a draft of a special warranty deed transferring the properties to Noland only.

34. At the closing, following Noland's failure to tender the purchase price, a representative of the Trustee stated that the Trustee would be willing to extend the closing until the following Thursday (June 29, 1967) if Noland would increase his deposit from $5,000 to $100,000. Noland's counsel asked whether the Trustee would consider extending the closing until the following Thursday if Noland were to increase his deposit to $100,000. The Trustee said that it would accept this deposit in Federal funds or by certified or cashier's check, if received by it no later than 2:00 p.m. the same day (June 23, 1967). It was agreed that Noland and his counsel would meet with the Trustee's representatives at 2:00 p.m. the same day (June 23, 1967).

35. At 2:00 p.m. on June 23, 1967, Noland's counsel met again with the representatives of the Trustee. Noland was absent. Noland's counsel stated that Noland had been unable to raise the funds and asked that he be allowed to deliver the funds to the Trustee by 10:00 a.m. the following Monday, June 26, 1967.

36. At the meeting referred to in the preceding paragraph, counsel for the Trustee tendered to counsel for Noland a draft agreement extending Noland's time to close until June 29, 1967, which counsel for Noland stated was in satisfactory form. This draft agreement was dated June 23, 1967 (the date of the meeting). It was prepared for use in the event Noland increased his deposit and therefore recited

that Noland had increased his deposit to $100,000 in consideration for an extension of the closing to June 29, 1967. However, Noland never increased his deposit and the draft agreement was never executed.

37. On June 28, 1967, the Report of Trustee on Default of Purchase of North Wales and Ullman Farm was submitted to the Bankruptcy Court. This Report did not mention Fletcher or Naylor by name.

38. On June 30, 1967, the Trustee wrote identical letters to Fletcher and Naylor stating:

> "Because of your connection with the offer of Mr. Bruce Noland to purchase the properties of Parkwood, Incorporated, known as North Wales and Ullman Farm, we are enclosing a copy of the Report of the Trustee filed yesterday with the United States District Court for the District of Columbia, as well as a copy of a letter we have addressed today to Mr. Noland."

39. The enclosed copy of the Trustee's letter to Noland stated that there was enclosed a copy of the Trustee's Report "concluding that you had defaulted in the performance of your contract to purchase from the Trustee the properties" known as North Wales and Ullman Farms. The Trustee also enclosed in the letter to Noland the $5,000 deposit, and stated:

> "The Trustee has, pursuant to this option, determined to avail itself of such legal and equitable rights as it may have rather than to retain the deposit as liquidated damages."

40. The Trustee's letter of June 30, 1967, was its first communication with Fletcher, and the only communication it had with Fletcher between June 29, 1967 and the filing

of its Application for specific performance and damages against Noland, Naylor and Fletcher in the Bankruptcy Court on July 11, 1967. The Trustee served copies of its Application on Fletcher and Naylor by mail.

41. Counsel for Fletcher and Naylor, respectively, filed motions to quash the service upon them of the Trustee's Application. The Bankruptcy Court by Order of April 22, 1968 granted these motions on the sole ground that it did not have summary jurisdiction over them.

42. Subsequently, Naylor was brought back into the summary bankruptcy proceeding by Noland as a third-party defendant. Naylor died October 24, 1968, but a service of Noland's third-party complaint was accepted by Naylor's Administratrix. Noland's third-party complaint sought a contribution of one-half of any judgment the Trustee recovered against Noland on the allegation, *inter alia*, that:

> "c. G. Rodgers Naylor, Jr. was by the terms of the aforesaid arrangements and additional undertakings, an equal partner with Bruce Noland in the venture to purchase the subject property."

The Trustee then filed its Application for damages against Naylor's Administratrix. On September 30, 1969, the Bankruptcy Court entered an Order granting a consent summary judgment with prejudice in favor of Naylor's Administratrix on Noland's third-party complaint against Naylor, thus preventing the Trustee from assertiing a cause of action against Naylor in the Bankruptcy Court.

43. Noland filed and served the same third-party complaint against Fletcher. The Bankruptcy Court granted Fletcher's motion to dismiss the third-party complaint by

Order dated June 30, 1970, in order to preserve Fletcher's constitutional right to trial by jury.

44. On February 12, 1971, the Bankruptcy Court entered a summary judgment against Noland on the Trustee's Application for damages in the amount of $246,354.54. That judgment has been docketed in this Court. A writ of execution upon that judgment has been returned unsatisfied by the Marshal of this Court.

45. On September 1, 1967, the Trustee entered into an agreement with National Land Company (hereafter "National") to sell the North Wales and Ullman Farm properties to it for $1,700,000 with a $100,000 deposit, subject to court approval.

46. On September 13, 1967, the Trustee filed with the Bankruptcy Court its Application for Authority to Accept the National Offer (unless a better offer were received), to which it attached a copy of its contract of sale with National. In its Application the Trustee stated, *inter alia:*

> "8. Prior to receipt of the National Offer the Trustee had received an offer from Mr. Bruce Noland to purchase North Wales and the Ullman tract. The offer was the subject of a hearing which ultimately resulted in the Court approving the sale to Mr. Noland for $1,900,000. . . . Mr. Noland defaulted at the time of settlement. (Mr. Noland's default has been described to the Court in a report of the Trustee dated June 29, 1967, to which reference is hereby made.). . ."

The names of Fletcher and Naylor did not appear in either the Trustee's Application or the contract with National. The Trustee also requested in its Application that it be authorized to expend as much as $5,000 (exclusive of

brokerage commissions, if any) in advertising and promoting the resale of the property.

47. At no time was it ever expressly stated *in haec verba,* orally or in writing, by the Trustee or any of its representatives or attorneys, or by the Special Master, or by the Bankruptcy Court, that the sale of the North Wales and Ullman properties to National was "for the account and risk of Fletcher."

48. By order of September 19, 1967, the Bankruptcy Court referred the Trustee's Application for approval of the National contract to the Special Master for hearing and judicial resale of the properties.

49. The Order of September 19, 1967 recited, *inter alia:*

> "... and it appearing ... that the Trustee has recommended that if no better or higher offers for North Wales and the Ullman Tract are received at or before the time of such hearing, the Trustee be authorized to accept the National offer...."

50. In compliance with the Bankruptcy Court's Order of September 19, 1967, the Trustee on September 24, 1967 sent to several persons, including Fletcher, a written Notice of Receipt of Offer to Purchase North Wales and the Ullman Trust and of Time and Place for Hearing Thereon (October 5, 1967).

51. Of the five thousand dollars authorization requested by the Trustee and granted by the Court for advertising and promoting the resale of the properties, the Trustee expended $660.42.

52. The Trustee advertised the resale of the properties in the Washington *Post,* Capitol Hill *Spectator,* and Fauquier *Democrat.*

53. The Referee, who had served as Special Master, stated, at a hearing held September 22, 1967, on the Trustee's Motion for Production of Documents:

> Since I was the one that made the recommendation that the sale be made to Mr. Noland and I had these documents [the financial statements and others] before me, I have to tell you at this time that it was on the strength of the financial statements of the three people tha. I made the recommendation.

54. The scheduled hearing on the Trustee's Application for approval of the National Land contract was held October 5, 1967. It lasted ten minutes. Fletcher knew of the hearing but was not present, nor did any person present state that he represented Fletcher. No offers were made to compete with the National offer.

55. On October 11, 1967, the Special Master filed his Supplemental Report with the Court in which he recommended the sale of the properties to National for $1,700,000. The Trustee served a copy of this Supplemental Report upon Fletcher.

56. By Order dated October 27, 1967, the Court approved the sale of the properties to National Land Company. The parties performed their sale and purchase contract.

57. In his order dated June 9, 1970, authorizing the Trustee to bring this action against Fletcher in this Court, Judge Gasch stated, *inter alia,* that "the [Bankruptcy] Court relied on Keith N. Fletcher's financial statement in deciding to award the sale of North Wales and Ullman Farms [sic] to Bruce Noland."

Dated: January 25, 1972

/s/ W. W. Koontz
Boothe, Pritchard & Dudley
711 Princess Street
Alexandria, Va. 22313
Counsel for Plaintiff

/s/ John S. Hoff
Leva, Hawes, Symington, Martin
& Oppenheimer
815 Connecticut Ave., N.W.
Washington, D.C. 20006
Counsel for Plaintiff in its
Capacity as Trustee in
Reorganization

/s/ Bolling R. Powell, Jr.
P.O. Box 800
Gloucester, Va. 23061
Counsel for Defendant and
Third-Party Plaintiff